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A tenth of U.S. veteran coal miners have black lung disease: NIOSH

Jul 19, 2018

By Richard Valdmanis

(Reuters) – More than 10 percent of America’s coal miners with 25 or more years of experience have black lung disease, the highest rate recorded in roughly two decades, according to a government study released on Thursday that showed cases concentrated heavily in central Appalachia.

The study by researchers from the government’s National Institute of Occupational Safety and Health marks the most authoritative evidence to date of a resurgence of the incurable respiratory illness caused by coal dust, which plagued miners in the 1970s but was nearly eradicated by the 1990s.

“Although many consider black lung a disease of antiquity, it is undeniable that ... these contemporary cases resulted from injurious exposures encountered in the 21st century,” the authors said in the report, published in the American Journal of Public Health.

The National Mining Association, which represents U.S. coal mining companies, has cast doubt on assertions that black lung disease is rebounding, arguing that miners are not required to participate in screenings.

“The exclusion of healthy individuals who self-select out of the program may skew the results – we won’t know until more data is available,” said NMA spokeswoman Ashley Burke.

The authors of the NIOSH report said that their findings underscored the need for stricter regulations as the administration of U.S President Donald Trump seeks industry feedback on coal dust policy enacted in 2014. The 2014 standards reduced allowable miner coal dust exposure in underground mines to 1.5 milligrams per cubic meter, from 2 mg/m³.

“Enhancement and diligent enforcement of the 2014 standards remains critical for reversing these trends,” they wrote.

Burke said the NMA does not oppose the 2014 limits.

She added: “The study’s findings are very troubling but, importantly, cover miners whose exposure dates back decades, before more rigorous standards were put into place.”

APPALACHIAN CLUSTER

The highest rates of the disease are appearing in central Appalachian states like Kentucky and West Virginia, according to the report. In that region, a fifth of long-serving miners have black lung disease, and five percent have an advanced form considered completely debilitating.

“We can think of no other industry or workplace in the United States in which this would be considered acceptable,” they wrote in the report.

Health officials, who have been flagging anecdotal evidence of increased rates of black lung for years in Appalachia, say miners in the region are plumbing the depths of played-out coal seams using heavy blasting equipment that can exacerbate dust exposure.

The National Academies of Sciences, Engineering and Medicine last month said that coal companies need to make a “fundamental shift” in how they control exposure to coal dust. It also urged regulators to enhance dust monitoring and conduct more research on the causes of the resurgence.

Meanwhile, a federal fund to aid victims of black lung disease could require a multi-billion dollar taxpayer bailout if Congress does not extend or increase the tax on coal production that funds it, the Government Accountability Office said last month.

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Federal Prosecutor Adds Charges In Kentucky Coal Dust Fraud Case

By Becca Schimmel

February 27, 2019

A federal prosecutor announced new charges against a senior coal company official for conspiring to falsify the required monitoring of coal dust. The case comes amid a surge in cases of black lung disease and widespread allegations from miners that cheating on dust monitors is common in the mining industry.

Western Kentucky District U.S. Attorney Russell Coleman unsealed a new indictment Wednesday against the former manager of all of the western Kentucky mines belonging to the now-bankrupt Armstrong Energy coal company. Glendal "Buddy" Hardison is charged with conspiring to defraud the United States and the Mine Safety and Health Administration, the federal agency in charge of enforcing dust controls in coal mines.

The indictment alleges Hardison met with Ron Ivy, who is also charged in the indictment, and ordered agents of Armstrong Coal Company to "make the pumps come in." Coleman said that meant that the employees were to make sure the air monitoring pumps showed acceptable levels of coal dust.

Coleman said company documents back up the allegations.

"We're looking at documentation that is demonstrating supposed dust samples from days that these mines weren't even operable. They call that a clue in my profession," he said.

Coleman said the investigation remains open and active.

“We’re going after the bad actors such as Armstrong Coal and I can assure you that this investigation remains open and this investigation remains active,” he said. “Our goal is to go up the chain to those that made decisions, very clear business decisions that exposed miners to a grave degree of risk.”

The latest charge expands on indictments announced in July. Coleman said whistleblowers who worked in the mines were critical to bringing the original charges. Acting on a tip from miners, federal inspectors found violations at Armstrong Energy’s Parkway and Kronos mines.

Those charged include the manager of all of Armstrong Coal’s western Kentucky mines, a superintendent, safety director and section foreman at Armstrong’s Parkway Mine and a safety director at the company’s Kronos mine. All those originally charged last year have pleaded not guilty. Hardison’s arraignment is set for March 28.

The indictments also refer to Armstrong Coal Company as “an unindicted co-conspirator.”

The Kronos Mine remains in operation under different ownership. The Parkway Mine is no longer open.

Ninth Former Armstrong Coal Official Charged in Kentucky Case

- Mar 07, 2019

Armstrong Coal, now bankrupt, is designated by the indictment as an unindicted co-conspirator. The former Armstrong supervisory and safety officials who have been charged in the case are:

- Charley Barber, 63, of Madisonville, a former superintendent of Parkway Mine
- Glendal Hardison, 69, of Belton, former manager of all of Armstrong Coal western Kentucky mines
- Brian Keith Casebier, 60, of Earlington, a former safety director at Parkway Mine
- Steven Demoss, 48, of Nortonville, a former assistant safety director at Parkway Mine
- Billie Hearld, 42, of Russellville, a former section foreman at Parkway Mine
- Ron Ivy, 50, of Manitou, a former safety director at Kronos Mine
- John Ellis Scott, 62, of South Carrollton, a former employee in the Safety Department at Parkway Mine
- Dwight Fulkerson, 40, of Drakesboro, a former section foreman who performed dust testing at Parkway Mine
- Jeremy Hackney, 46, of White Plains, a former section foremen who performed dust testing at Parkway Mine

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COAL INDUSTRY'S GO-TO LAW FIRM WITHHELD EVIDENCE OF BLACK LUNG, AT EXPENSE OF SICK MINERS

'Breathless and Burdened: Dying from black lung, buried by law and medicine'

BREATHLESS AND BURDENED

Chris Hamby

INTRODUCTION

Key findings:

Jackson Kelly PLLC, long the go-to law firm for coal companies seeking to beat back miners' claims for federal black lung benefits, has a decades-long record of:

- **Withholding key evidence.** The firm has shielded reports generated by doctors of its choosing when even they found the miner had black lung. Of 15 cases reviewed in detail by the Center — dating from the 1980s to the present — the firm withheld reports in at least 11. Jackson Kelly has argued, sometimes successfully, that there is nothing improper about its approach, saying it submits evidence that support its case.
- **Presenting incomplete or potentially misleading evidence.** The firm has allowed judges and consulting doctors to form opinions based on only the reports it chose to provide, even as it withheld other documents that cast doubt on what was in the record.
- **Conceding the case and avoiding disclosure.** In the rare instances when a miner's lawyer pushed for documents to be turned over and a judge commanded the firm to do so, Jackson Kelly, on behalf of its client, sometimes conceded the case, in theory rendering disclosure moot. This happened in six of the cases reviewed by the Center.

BECKLEY, W.Va. — The stately, wood-paneled chamber in the federal building here unsettled Gary Fox and his wife, Mary. Fox was used to the dusty caverns of the mines in the southern part of the state, where he'd spent more than 25 years working underground in the heart of Appalachian coal country. They had never been in a courtroom before.

It had been at least 15 years since Fox first noticed signs of black lung disease. It started with shortness of breath. Then a cough that yielded black mucus. By 1999, his symptoms convinced him to apply for federal benefits. A doctor certified by the U.S. Department of Labor examined him and diagnosed the most severe form of the disease, known as complicated coal workers' pneumoconiosis. The government ordered his employer, a subsidiary of behemoth Massey Energy Co., to begin paying him monthly benefits, but, as is almost always the case, the company appealed.

Gary and Mary now found themselves visitors in a foreign world — one populated by administrative law judges who must make sense of reams of medical evidence, sophisticated legal arguments and arcane rules; coal-company lawyers who specialize in the vagaries of the system and know how to attack claims; and doctors who consistently find cause to diagnose almost anything but black lung.

Among the most prominent denizens of this world are the attorneys in the federal black lung unit of the law firm Jackson Kelly PLLC. For almost two centuries, the firm has served the coal industry. It is the go-to place for many of the industry's giants when they want to beat back a miner's claim for benefits.

Jackson Kelly, with offices throughout Appalachia, as well as in Denver and Washington, D.C., defends companies accused of polluting the environment, marketing dangerous drugs or discriminating against workers. It helps corporations avoid regulations, drafts bills and lobbies legislators. Its bailiwick, though, is mining. *U.S. News & World Report* recently named it the nation's top firm in mining law. Jackson Kelly's name is on the lips of clinic workers, miners and lawyers throughout Appalachia and is emblazoned atop an office overlooking the Monongahela River in Morgantown, W.Va.

Now, with government scientists documenting a resurgence of black lung disease, the firm's legal strategy — including, the Center for Public Integrity found, a record of withholding evidence — could have significant consequences for sick miners and their families.

On this September morning in 2000, in the courthouse named for longtime Sen. Robert C. Byrd, an experienced Jackson Kelly attorney sat at one table. At the other, Gary and Mary sat alone, having tried unsuccessfully to find a lawyer. This imbalance is not uncommon, as claimants' attorneys have fled the federal black lung system in recent decades. Time and money are on the side of the coal company, which can hire scads of experts and drag cases out for years or decades. Miners' lawyers are legally barred from charging claimants any fees, and the payoff, in the rare event of a win, is relatively meager.

The Robert C. Byrd Federal Building and U.S. Courthouse in Beckley, W.Va., where Gary and Mary Fox, unable to find a lawyer, faced a seasoned Jackson Kelly attorney during a 2000 hearing. (GSA.gov)

Tall, lean and stoic, Fox, then 50, answered the judge's questions with quiet deference — "Yes, sir" and "No, sir." His brief testimony, along with the report from the examination paid for by the Labor Department, constituted virtually his entire case. Then it was Jackson Kelly's turn. Exhibit after exhibit became part of the record — medical reports, depositions, résumés of eminent doctors who'd reviewed the evidence.

More important, however, was what didn't make it into the record. Two years earlier, doctors had removed a suspicious mass from Fox's lung. The purpose had been to rule out cancer, which the hospital's pathologist had done. There is no evidence he looked for signs of black lung, or even that he knew Fox was a miner. Unknown to Fox, however, Jackson Kelly had obtained the slides of his lung tissue and sent them to two pathologists in its usual stable — doctors whose opinions typically supported the firm's case.

This time Jackson Kelly didn't get the answer it wanted. Both pathologists wrote reports indicating the mass likely was complicated black lung — a finding that, if credited by the judge, automatically would have won the case for Fox.

The firm's lawyers could have accepted the opinions of the doctors they'd relied on so many times before. They could have conceded that Gary's case had merit and agreed to pay him and Mary \$704.30 a month, allowing him to escape the dust destroying his lungs. Even if they chose to fight the claim, they could have allowed their experts to see all of the pathology reports as they formed their opinions.

Jackson Kelly PLLC headquarters in Charleston, W.Va. (Google Maps)

None of that is what the lawyers at Jackson Kelly did. Instead, the firm withheld the reports; Fox, the judge and the firm's own consulting doctors had no idea they existed. In the months that followed, a team of Jackson Kelly lawyers built a case around the hospital pathologist's report and its vague diagnosis of "inflammatory pseudotumor." They encouraged the court and their own consulting doctors to view the report as the sole, definitive account of what Fox's lung tissue revealed. Even one of the doctors retained by Jackson Kelly originally thought Fox had black lung. After being given the pathologist's report, he changed his mind.

Relying heavily on the pathology report, a judge denied Fox's claim for benefits in 2001, leaving him few options. He had a family to support, and he needed health insurance because Mary had a chronic illness. He went back to the mine, his health deteriorating. For years, no one but the firm knew of the powerful evidence that he had the severe disease and should get out of the mine's dusty atmosphere immediately.

What happened to Gary Fox was not the result of a rogue attorney or singular circumstances. It was part of a cutthroat approach to fighting miners' claims that Jackson Kelly has employed to great effect for decades, an investigation by the Center for Public Integrity has found. Some of the firm's tactics go beyond aggressive advocacy, crossing into unethical behavior, according to current and former judges, lawyers and state disciplinary officials. As a result, sick and dying miners have been denied the modest benefits and affordable medical care that would allow them to survive and support their families.

The role of lawyers in orchestrating sophisticated legal strategies to defeat claims for benefits is just the first chapter in the story of a system in which well-paid specialists thrive as miners struggle, the Center's yearlong investigation, *Breathless and Burdened*, found. Coal companies rely on a cadre of doctors with prestigious affiliations, including a unit at the nation's top-ranked hospital, to trump the opinions of miners' physicians. Experts for hire continue a century-old tradition: denying scientific evidence that black lung can assume different appearances in different people, locking an entire class of sick miners out of the benefits system.

Jackson Kelly, documents show, over the years has withheld unfavorable evidence and shaped the opinions of its reviewing doctors by providing only what it wanted them to see. Miners, often lacking equally savvy lawyers or even any representation, had virtually no way of knowing this evidence existed, let alone the wherewithal to obtain it.

In the rare cases in which miners' lawyers have pushed for access to these materials and a judge has ordered disclosure, Jackson Kelly has fought back aggressively, arguing that it has the right to withhold them. The firm has asked higher courts to intervene and accused judges of bias. It has defied court orders, knowing administrative law judges have no contempt powers to enforce their commands, or conceded the case rather than turn over evidence.

In published decisions, judges have called the firm's defenses of its actions "ludicrous" and "flimsy at best." "This is pretty shocking," a current judge wrote of Jackson Kelly's behavior in a 2009 email obtained by the Center. "It appears to represent a long-standing pattern of misconduct."

Still, judges generally haven't been receptive to arguments that Jackson Kelly's handling of a particular case is symptomatic of anything broader or that disciplinary action is warranted.

Fox's case, still unresolved, could change that. A judge deemed Jackson Kelly's actions in the case a fraudulent scheme that threatened the integrity of the judicial system. A split appeals court vacated that ruling, and the decision is now on appeal. After the Center contacted the West Virginia Office of Disciplinary Counsel and asked whether action would be taken, the office opened investigations into three Jackson Kelly lawyers who were involved in Fox's case. To date, they have not been charged with any wrongdoing.

The judge who denied Fox's claim in 2001, Edward Terhune Miller, recently retired and, in an interview with the Center, learned what had been shielded from him more than a decade earlier. His eyes widened, and, for a moment, he was speechless.

"I'm utterly dumbfounded," he said. "I just cannot conceive of attorneys doing that. ... That's really misleading the court. It's misleading the witnesses. It's tainting the witness testimony."

"I'm utterly dumbfounded. I just cannot conceive of attorneys doing that. ... That's really misleading the court. It's misleading the witnesses."

RETIRED ADMINISTRATIVE LAW JUDGE EDWARD TERHUNE MILLER, AFTER LEARNING EVIDENCE HAD BEEN WITHHELD FROM HIM MORE THAN A DECADE EARLIER.

Jackson Kelly's general counsel, on behalf of the firm and the individual attorneys contacted by the Center, declined repeated interview requests and would not discuss specific cases or general practices. In court filings, the firm has argued that there is nothing wrong with its approach and that its proper role is to submit the evidence most favorable to its clients.

A spokesman for Alpha Natural Resources, which purchased Massey Energy and is now opposing Fox on appeal, declined to comment on the case while it is ongoing.

Until now, Jackson Kelly's conduct in black lung cases has remained largely buried in voluminous files that are confidential because of the private medical and financial information they contain.

Over the past year, however, the Center has identified key cases and obtained written permission from miners or their surviving family members to view their entire case files. These 15 files span 40 years and include hundreds of thousands of pages. The Center also reviewed the limited publicly available information on dozens more of the firm's cases.

These documents reveal a struggle that has been waged out of public view for more than three decades between a handful of lawyers representing miners and the nationally prominent firm. In at least 11 of the cases reviewed by the Center, Jackson Kelly was found to have withheld potentially relevant evidence, and, in six cases, the firm offered to pay the claim rather than turn over documents as ordered by a judge.

Other workers' compensation programs use a panel of independent medical experts, and some judges have suggested rules requiring both sides to disclose all of their medical evidence. Such suggestions have fallen flat in the federal black lung system, where fights over evidence play out on a case-by-case basis.

The integrity of the program created more than 40 years ago is arguably more important now than in years. Government researchers have documented a revival in the disease since the late 1990s, and the number of claims filed with the Labor Department has increased in recent years. After decades of decline in the disease's prevalence, government surveillance now indicates that more than 6 percent of miners in central Appalachia are afflicted with black lung, which is increasingly affecting younger miners and taking a new, more aggressive form. Researchers suspect this is an undercount.

Though conditions have improved since landmark 1969 legislation, today's roughly 85,000 U.S. coal miners face new dangers posed by an increasingly toxic mixture of dust generated by advanced machines that rapidly chew through coal and rock. For an average wage of about \$25 an hour, they risk explosions, rock falls, fires and disease.

In the past five fiscal years, the Labor Department has issued initial decisions in more than 23,000 claims, and the proportion of miners who win their cases remains low. During the 2012 fiscal year, about 14 percent of claims led to an award by the Labor Department at the initial level. The real number, after appeals, is likely lower, though no definitive statistics are available.

Coal companies appeal almost every award, and this is when lawyers like those at Jackson Kelly typically develop mounds of evidence. Even if a miner prevails before a judge, the decision must get past an administrative appeals board with a record of vacating awards, often for highly technical reasons. Four of the board's five members were appointed under the Reagan or George W. Bush administrations.

The administrative court system, originally meant to benefit miners, has evolved into a byzantine maze of seemingly endless litigation with its own rules and peculiarities that can befuddle even experienced lawyers. Much more than in civil court, the balance of power is tipped in favor of defendants, and cases receive little outside scrutiny.

Fewer than one-third of miners have a lawyer at the initial stage of their cases, Labor Department statistics show. Coal companies and their insurers, however, are almost always represented by lawyers who specialize in black lung claims.

As perhaps the preeminent federal black lung defense firm, Jackson Kelly's legal strategy offers a window into an opaque, highly technical world that touches thousands of lives each year. In the cases reviewed by the Center, the firm has argued that its tactics are entirely proper. Lawyers and judges have said the behavior revealed in these known cases likely has occurred on a widespread basis. "They played hardball," recently retired judge Daniel Leland told the Center, calling the firm's approach "an all-out effort to win every case."

But in Gary Fox's case, events unfolded that the firm's lawyers may not have anticipated. Unlike many miners, Fox eventually would connect with a tenacious lawyer — a carpenter-turned-clinic-worker-turned-attorney practicing out of his home in rural southern West Virginia. These two men would challenge the powerful firm. Even as coal dust consumed his lungs and he waited for a transplant he hoped would save his life, Fox planned to fight.

He'd grown up poor, and he wanted a more comfortable life for his family. Mining was the best money around.

Gary Fox and his daughter, Terri Smith
(Courtesy of Terri Smith)

Born in 1950, he eventually earned a GED and finished two years of college. In 1970, he was shipped to Vietnam, where he drove a tractor-trailer for the Army. After sheet metal crushed his foot, he was sent home. In 1972, he married Mary Lynn Smallwood, whom he'd met before deploying overseas. Four years later, they had a daughter, Terri.

Fox worked for a few years driving a truck for companies like Coca-Cola and Beckley Oil. In 1974, he went underground, signing up with Itmann Coal Co. For some 13 years, his main job was to control a continuous mining machine, which uses a spinning drum head studded with teeth to tear through coal seams, generating clouds of dust. When he went to work for Birchfield Mining Co. in 1987, he switched to roof bolting. After a new area was carved out of the earth, he was among the first in, using a machine to drive rods into the unstable rock above and pin it to higher, more secure rock. He continued bolting when he went to work for the Massey subsidiary Elk Run Coal Co. in 1993.

For most of his 30-plus years underground, he worked in the jobs that expose miners to the highest concentrations of dust, commanding higher pay and posing greater risk of developing black lung. Six-day weeks were the norm.

He pushed Terri to excel in school and to learn to take care of herself. When she turned 16, she wasn't allowed to drive until she could change the tires and oil herself. They put brakes on the car together. Fox encouraged her to go to college, and she would graduate with a nursing degree and no student loans.

He relished time with Mary and Terri, rarely discussing his job. "His family came first," Mary recalled. "He didn't bring work home."

Sunday was family day. "Don't ever think that you're going to go do something with your friends or anything," Terri recalled. Maybe they'd go to a state park or drive south to Gatlinburg, Tenn., for breakfast. Travel was impulsive, and the specifics weren't especially important.

"If I needed a new pair of shoes, most girls would go out with their moms or go out by themselves. All three of us went," Terri said, laughing. "Everybody thought we were strange, but we were a very, very close family."

Greater financial security had its price. Aside from Sundays, Fox rarely got to spend time with his family. Though he avoided discussing the hazards of his job, they often occupied Mary's thoughts. "When somebody calls your house in the middle of the night when your dad is at work, it sends a shiver up your spine until you realized it was a wrong number or something," Terri recalled.

By the 1980s, subtle but troubling signs began to appear. Fox grew tired more easily, and his breathing became labored. He kept a spit cup in his truck for the black phlegm he coughed up. "If he'd blow his nose," Mary recalled, "it would be black."

Pressing for answers

In the years leading up to Fox's first claim, glimpses of Jackson Kelly's tactics began to surface. That was, in large part, because of John Cline, a soft-spoken but tenacious man who would eventually become Fox's lawyer.

John Cline, who would eventually earn a law degree in 2002 and begin representing Gary Fox in 2007, came to southern West Virginia in 1968 as part of the program Volunteers in Service to America. For much of the next two decades, he built homes primarily for poor people who qualified for a government low-interest loan program. In 1987, he went to work for a clinic that provided miners health care and advice on filing benefits claims.

A native of East Aurora, N.Y., a small town near Buffalo, Cline came to southern West Virginia in 1968 at 22 to work for Volunteers in Service to America, combating poverty in the coalfields. Also a carpenter and electrician, he spent most of the next two decades as a contractor building homes mainly for poor people who qualified for a government low-interest loan program.

In 1987, he joined the New River Health Association in Scarbro, W.Va., one of a group of nonprofit clinics that provide miners health care and advice on filing a claim. By the early 1990s, he was taking cases on his own as a lay representative, helping miners who couldn't find a lawyer navigate the system's complexities.

Cline entered the world of federal black lung benefits at a time when many who traditionally had helped miners were getting out. Changes to the law in 1981 had made winning benefits much more difficult. The influence of the United Mine Workers union was waning.

One of the peculiarities of the federal black lung system is the virtual nonexistence of the discovery process — both sides exchanging evidence they develop. Documents that would be disclosed routinely in civil court — reports prepared by experts or information on financial ties between a defendant and its witnesses, for example — are not commonly requested in black lung cases. Even when they are, a judge may opt not to compel disclosure.

Calvin Cline, center with tinted glasses, at a Congressional hearing alongside a fellow miner (Courtesy of John Cline)

Cline soon found himself in the middle of the nascent fight over what information had to be turned over. In 1995, he became the lay representative for Calvin Cline, a retired miner who was no relation to John. Calvin had worked 30 years underground, sometimes spending hours on his stomach clawing out coal in openings less than three feet high. By 1979, he could no longer keep up; he could barely breathe. When John took over his case, Calvin had been fighting for 15 years and had just suffered his second loss to Westmoreland Coal Co., which had hired Jackson Kelly. A Westmoreland spokesman declined to comment on particular cases or the benefits system generally.

John asked the court to force the firm to turn over any evidence it had withheld previously. The request lacked the polish of a seasoned lawyer, but it revealed a street-smart skepticism. In an attached affidavit, he said he'd almost never seen a case in which Jackson Kelly didn't submit X-ray readings by Dr. Jerome Wiot, a radiologist at the University of Cincinnati who had helped establish the criteria for identifying black lung on films and was a favorite of the firm because, in judges' eyes, his opinion often trumped all others. Despite his revered

status, he had a narrow view of what black lung looked like on film, setting the bar for diagnosis very high and reliably benefiting coal-company defendants.

In Calvin's case, Jackson Kelly had submitted numerous X-ray readings, but none from Wiot.

Jackson Kelly responded with indignation, but not explicit denial. "There is absolutely no proof that the Employer consulted with [Wiot] in this case," lawyer Ann Rembrandt wrote in a response brief.

When the case went to the highest appeals court in the administrative system, the Benefits Review Board, Cline felt out of his league as a non-lawyer and enlisted the aid of a kindred spirit and fellow New York native, attorney Robert Cohen.

Withheld evidence

By Chris Hamby and Chris Zubak-Skees

October 29, 2013

The prominent black lung defense firm Jackson Kelly PLLC has a record of withholding key evidence, the Center for Public Integrity found as part of the yearlong investigation "Breathless and Burdened." Here are five examples from confidential case files obtained by the Center. Each stack of paper represents a miner's file, with the earliest filings and evidence at the bottom. The red paper shows when in the progression of the case a key piece of evidence was generated. These reports were not disclosed until months or years later, and, in some cases, they showed that a miner's previous defeat had rested on incomplete or misleading evidence.

Years earlier, Cohen had begun unraveling Jackson Kelly's strategy. Of the formal written questions Jackson Kelly was serving on his clients, one stood out: *Do you have any medical evidence or expert reports that you haven't already submitted?* When he asked the same question, the firm refused to answer. He'd touched off a fight that continues today. Though Jackson Kelly's argument has evolved somewhat over the years, it has been essentially the same since at least 1990: Any doctor's report that the firm chose not to submit was "attorney work product" — protected from discovery under a privilege meant to shield lawyers from having to disclose their personal impressions and informal communications with potential witnesses while preparing a case. The firm filed briefs outlining this argument in virtually every case reviewed in detail by the Center.

To Cohen and Cline, this argument seemed plainly wrong. The documents they wanted were not lawyers' notes and correspondence with consultants, but formal reports written by doctors the firm had retained. They were no different than the reports that did end up in evidence, it seemed to them; the firm just didn't like what these reports said.

Calvin's case provided an opportunity for the review board to address the dispute. Labor Department lawyers filed a brief siding with Cohen, writing that the firm "has the obligation to disclose all evidence developed, whether favorable or unfavorable."

In a landmark decision in October 1997, the review board agreed for the most part. The board concluded that a miner could obtain any withheld reports by meeting a series of requirements — essentially that the evidence be vital to the case and unobtainable by other

means. But this left the decision of whether a miner had met the requirements up to individual judges, who would arrive at differing conclusions in the years that followed. Jackson Kelly has tweaked its arguments, and it continues to fight disclosure today. In Calvin's case, Jackson Kelly had to turn over any evidence it had withheld, and John's hunch proved correct. Not only had the firm consulted Wiot, but he had had written reports interpreting numerous X-rays and a CT scan as consistent with complicated black lung. In 2008, Jackson Kelly would abandon its appeals. After 28 years, Calvin had his benefits. Two years later, he died. Just months after the board's decision, Cline made another discovery. By April 1998, retired miner William Harris had been trying to win benefits for 18 years. His most recent employer, Westmoreland Coal Co., had hired Jackson Kelly. When Cline began representing him in September 1997, an item's conspicuous absence jumped out.

In Harris' previous claim, some doctors had read X-rays as complicated black lung; others hadn't. Wiot, who has since died, had testified that it was a "judgment call" whether the disease had reached the complicated stage. He believed it hadn't, but a CT scan should remove any question, he'd said. CT scans are considered more accurate than X-rays because they allow doctors to see finer detail.

Harris underwent the scan, and the judge credited the negative reading of Jackson Kelly's expert, a radiologist at Johns Hopkins, over the positive reading of Harris' expert. Harris lost.

Why hadn't Jackson Kelly gotten Wiot to read the CT scan? Cline wondered. After all, they'd stressed Wiot's interpretation of the X-rays, and the judge had found that he "may be the preeminent radiologist in the country" when it came to identifying black lung. For seven months, Cline pushed for Jackson Kelly to turn over any reports it had on Harris. Finally, he decided on an end-run. He faxed a request directly to Wiot's secretary asking for the doctor's interpretation of Harris' CT scan, guessing that one existed. He soon got the response: a report finding the scan consistent with complicated black lung. Jackson Kelly had, in essence, stressed the importance of Wiot's X-ray readings when they supported the firm's case, then withheld his opinion of the more useful test when it didn't. The judge ordered Jackson Kelly to turn over any other documents it had on Harris. Instead, the firm conceded, agreeing to pay Harris benefits. Harris took the deal, ending his claim without finding out what else Jackson Kelly may have had in its files.

Cline and Cohen had uncovered some troubling signs, but just what they meant — and what to do about them — was not yet clear.

II. Denial

'All of the evidence'

To someone unacquainted with the federal black lung system, the claim that Gary Fox filed in May 1999 might have seemed fairly simple. He had more than 25 years of heavy exposure to disease-causing dust, virtually no history of smoking cigarettes and many of the typical signs of black lung. A doctor certified by the Labor Department had performed breathing tests and taken X-rays, concluding that he had the complicated form of the disease.

But federal black lung cases are almost never simple. Lawyers like those at Jackson Kelly thrive on medical uncertainty and alternative explanations for the miner's apparent illness.

A lone piece of evidence may provide the fuel, gaining strength in the self-reinforcing spread from one doctor's opinion to the next.

Thus it was with the pieces of lung tissue that had been surgically removed from Fox in 1998. Pathology is considered the best way to diagnose black lung, but it's not available in many cases. In Fox's case, Jackson Kelly took what could have been a damning piece of evidence and turned it into the centerpiece of its case.

There is no evidence that Fox grasped the significance of the pathology or connected the surgical removal of the mass to black lung. During his testimony in September 2000, Fox made only a passing reference to the surgery, which he told the judge had been to remove "a tumor." Even recently, when asked about it, Mary said, "All I know is it wasn't cancer."

The report from the hospital pathologist, who is now dead, mentions the surgery's purpose — to rule out cancer — and his diagnosis of "inflammatory pseudotumor," essentially a mass that looked like a tumor but probably was caused by some unknown inflammatory disease. The pathologist didn't mention the possibility of black lung, or that he had any information about Gary's job or risk for the disease.

Jackson Kelly clearly grasped the importance of the pathology. Unknown to Fox, the firm sent the slides of lung tissue to Drs. Richard Naeye and Raphael Caffrey, both of whom had decades of experience identifying black lung and were among a small group of pathologists that Jackson Kelly used frequently.

This time, however, Naeye found that the mass appeared to be attributable, at least in part, to the dust Fox had breathed for decades. Caffrey was even clearer, concluding, "this lesion most likely represents complicated pneumoconiosis."

Yet when the firm submitted evidence to its chosen pulmonologists — doctors who render a diagnosis incorporating the evidence provided to them — the reports by Naeye and Caffrey were nowhere to be found. Instead, Jackson Kelly allowed its group of four pulmonologists to believe that no interpretation other than the hospital pathologist's existed.

Dr. Gregory Fino, under this impression, began his report, "I have reviewed all of the medical records that you have been able to develop regarding the above-referenced Black Lung claimant."

In depositions, the firm's lawyers deftly guided its experts, asking variants of the same question: Does the pathology report call into doubt a diagnosis of complicated black lung? The question more or less dictated the answer: Yes.

Pulmonologist James Castle acknowledged that he had originally diagnosed black lung, but changed his mind because of the hospital pathologist's report.

Wielding the pathology as a cudgel to deal the final blow, Douglas Smoot, a senior attorney in the firm's black lung unit, sought to discredit the doctor who had evaluated Fox for the Labor Department and had based his diagnosis solely on his own examination.

"Do you think that [the Labor Department-certified doctor] would have been aided by having all of the biopsy medical evidence at his hand when he reviewed this case?" Smoot asked Castle during a deposition.

“I think that he would have,” Castle answered, unaware of the bitter irony of the exchange, “and I would certainly hope so, because all of the evidence, as I’ve outlined, clearly indicates that this is not complicated disease.”

Administrative Law Judge Miller made it clear that the pathology report was vital in his decision to deny Fox’s claim. The report, he wrote, “proved the large mass in the miner’s right lung to be a pseudotumor and neither cancer nor complicated pneumoconiosis.”

In a recent interview, Miller said knowing of the reports by Naeye and Caffrey would have changed the case dramatically. “I frankly think that, when you get to that point and you are offering evidence of a certain kind and you know material is there which clearly makes that evidence false or incomplete — you just don’t do that; that’s wicked,” he said.

Without a lawyer, Fox didn’t even try to appeal. Meanwhile, Mary was battling her own health problems. “I had to have insurance at the time,” Mary recalled. “And that’s really all he knew to do, was mining.” He went back to work.

A pattern emerges, out of sight

Case by case, the evidence of a pattern in Jackson Kelly’s conduct grew. It remained out of sight, amassing in confidential files.

For example, there was Clarence Carroll, who, during a battle with Jackson Kelly that lasted more than two decades, went from a 195-pound retired miner who enjoyed walks and line-dancing with his wife to a 112-pound skeleton tethered to an oxygen tank. Jackson Kelly, it turned out, had withheld X-ray readings by doctors, again including Wiot, who had found evidence of complicated disease.

But it was the firm’s handling of another potentially problematic opinion in Carroll’s case against his employer, Westmoreland Coal Co., that revealed particular finesse. Reading a series of X-rays is regarded as more accurate than reading a single X-ray because it allows the doctor to view the progression of the disease. Jackson Kelly made this exact argument in Carroll’s case when it submitted readings by some of its doctors.

But when one of its radiologists interpreted a series as showing complicated disease, the firm withheld the report. Instead, it went back to the same doctor two years later and showed him only the final film in the series. This time, he said the disease had not yet reached the complicated stage; Jackson Kelly won the case.

In other words, the firm had withheld a report that, according to its own argument, was more accurate and instead submitted a less accurate report more favorable to its case. After Cline filed a motion asking the judge to order Jackson Kelly to turn over any other evidence it might have, the firm conceded the case. Carroll died within three years.

There was Norman Eller, a retired miner and deacon at the Baptist church near his home in Slab Fork, W.Va., who eventually lost the breath to sing in the gospel choir or mow the lawn during his decade-long fight with Jackson Kelly, which had been hired by his employer, Elk Run Coal Co. A CT scan proved vital in his case.

The morning of a deposition by Jackson Kelly’s chosen pulmonologist, the firm gave the doctor a report interpreting the scan. It referenced the scan’s “limited” nature but said there was no evidence of black lung. During the deposition, Jackson Kelly attorney Mary Rich Maloy trained the doctor’s attention on the report, and he incorporated it into his opinion,

which the judge credited in denying Eller's claim. Jackson Kelly argued in its closing brief that the CT scan, also interpreted by another doctor as "incomplete" but negative for black lung, showed that Eller didn't have the disease.

What Jackson Kelly didn't disclose was a third reading of the CT scan — this one by Wiot — that stated explicitly just how "limited" the scan was. Because key portions weren't there, Wiot wrote, "evaluation for the presence or absence of pneumoconiosis cannot be made." In other words, according to Wiot, the scan was useless — not the strong evidence for the lack of disease that Jackson Kelly had claimed.

The firm eventually would drop its appeals in May 2010. Eller died eight months later.

And there were the widows.

In two cases examined by the Center, Jackson Kelly waited until a miner who was receiving benefits died, then not only fought his widow's claim as a surviving beneficiary but also filed to reopen the miner's claim, arguing that he never had black lung or wasn't disabled by it. In other instances, the firm made similar arguments but did not seek to invalidate the earlier victory.

In one case in which Jackson Kelly did try to turn a dead miner's previous win into a loss, the review board ruled that the firm's attempts to undercut the widow's claim by challenging anew the miner's earlier case were an attempt to "circumvent the law." The U.S. Court of Appeals for the Fourth Circuit called the firm's motives in doing so "patently improper." Jackson Kelly defended its actions as "proper" in a court filing.

In two other cases, Jackson Kelly fought the widow for years before conceding the case after a judge ordered the firm to turn over any evidence it was withholding.

"You think, 'They can't do that,' " said William DeShazo, the son of one of the widows. "But they did do that. ... So they start throwing the paperwork at my mom, and I think they hope for one of two things: You run out of resources, or you can't find a lawyer to help you." Cline eventually agreed to represent DeShazo's mother, LaVerne, who has undergone a series of strokes since her husband's death.

Jackson Kelly's approach — folding rather than turning over any undisclosed evidence it had — was eerily reminiscent of the end to Harris' case five years earlier, and, since then, Cline had seen the firm's strategy play out numerous times. Jackson Kelly would shop for evidence, he argued, then withhold unfavorable opinions, knowing there was little chance they would be discovered. In the rare cases in which the firm had been ordered to turn over withheld documents, it sometimes had conceded. This occurred in six cases reviewed in detail by the Center.

In theory, these cases are wins for the miners, but the strategy also benefits Jackson Kelly. The firm doesn't have to reveal documents that could show it chose to fight despite having strong evidence the miner had black lung. The tactic also prevents the miner from uncovering reports that might show he was diagnosed with the disease at an earlier date, entitling him to back pay for accumulated benefits. And it allows the firm to argue in a widow's claim that the miner never had black lung.

"My concern," a judge wrote in a 2005 email obtained by the Center, "is ... that for an attorney to circumvent an inquiry into his alleged misconduct, all that he has to do is concede liability."

Meanwhile, Jackson Kelly showed a willingness to defy court orders and to attack judges whose rulings it didn't like. In a pair of cases before Administrative Law Judge Fletcher Campbell in 2004, the firm refused to answer questions about its financial relationships with doctors it enlisted.

"This honorable tribunal does not have the authority to issue sanctions for failure to comply with an order compelling discovery," attorney Kathy Snyder pointed out in one case.

In one case, Jackson Kelly argued that Campbell's actions, including an order granting a discovery motion, amounted to bias. When a judge in another case raised the possibility of the miner's lawyer filing a discovery request, Jackson Kelly demanded he recuse himself. He did, and the case was reassigned to a different judge.

Campbell, now retired, said the information being requested of Jackson Kelly was perfectly reasonable.

"In any federal district court, this would be a no-brainer," he said. In the federal black lung system, however, things weren't so clear. In a number of cases reviewed by the Center, judges denied the requests of miners' lawyers for withheld documents or information.

In some cases, miners' lawyers asked judges to reprimand or penalize Jackson Kelly. But even as the firm's defiance of court orders and withholding of evidence recurred, it faced few repercussions, and there was no general recognition among judges that individual instances were part of a larger litigation strategy.

'Gary, you need to get away'

The complicated form of black lung that many doctors diagnosed in Gary Fox has another, more descriptive name: progressive massive fibrosis. The small scars laden with coal dust that characterize the simpler form coalesce into large masses. By this point, the march of the disease cannot be stopped. The scarring can spread, turning the lungs black and shriveled. It is irreversible, incurable and fatal.

When a miner shows signs of the disease, it is vital that he get out of the dusty atmosphere. In 2000, Fox transferred to a mining job that was not underground, but, even above ground, the dust was inescapable. After losing his claim, he worked five more years at the mine as his health worsened.

Mary was struggling with her own illness, and Gary tried to support her. "If I got bad news and cried, he'd crawl into bed and cry with me," Mary recalled.

She could see him withering. No longer could he cut the grass or climb steps. He couldn't walk far before his breathing became labored and he had to stop.

Co-workers saw it, too. One, who asked not to be named because he is pursuing his own claim and fears retaliation, recalled coming upon Fox in the bathhouse in the throes of a coughing fit day after day.

"Gary, you need to get away," he told Fox after one spell. "The dust is killing you."

"Yeah," Fox replied. "I know."

III. Decision

A familiar pattern — and an opportunity

John Cline at his home office in Piney View, W.Va.

(F. Brian Ferguson/Center for Public Integrity)

Gary Fox and John Cline met in January 2007. Two months earlier, Fox finally had decided he couldn't go on working; he retired and filed a second claim for benefits. The doctor who examined him for the Labor Department knew Cline and had suggested Fox contact him.

Cline found Fox quiet and thoughtful. Though he was only 56 years old, Fox clearly was struggling to breathe just from a couple of hours of conversation. In the past two years, he'd lost about 40 pounds. The Labor Department-certified doctor again had diagnosed complicated black lung, and this time he'd noted a severe decline in Fox's lung function.

The case instantly aroused Cline's suspicions. He had finished law school just five years earlier, but he'd seen Jackson Kelly in operation for much longer. To him, the lack of pathological evidence generated by the firm was a red flag. He told Fox he thought it was likely the firm had reports about his lung tissue that it had never revealed. A week later, the two talked again. Cline took the case.

Within days, he served Jackson Kelly with formal written questions, asking for any evidence not turned over. When Jackson Kelly attorney Ann Rembrandt refused, Cline filed a discovery motion with the judge, Thomas Burke. Rembrandt gave the firm's standard response, fine-tuned over the years, claiming that any reports it chose not to submit were privileged.

Burke sided with Cline.

Jackson Kelly continued to fight, filing motions asking Burke to reconsider and asking the review board to intervene. The board declined, and Judge Burke again ordered Jackson Kelly to turn over evidence by August 4, 2008.

The deadline arrived, but the firm didn't produce any documents. Instead, it conceded the case.

By now, Cline knew the strategy well. In past miners' claims, he'd tried to keep the case alive, to force Jackson Kelly to turn over the evidence it had withheld, to expose just what information the firm had and when it had it. He hadn't been successful.

There was reason to believe this time might be different. But first, he and Fox had an unenviable choice to make.

A legal tipping point

In the years leading up to Fox's retirement and second claim, there were signs that perceptions might be shifting among the administrative law judges who hear black lung cases. That was, in large part, because of Elmer Daugherty.

A retired miner who had worked more than 30 years underground, most of that time for Westmoreland Coal Co., Daugherty had tried multiple times to win benefits, losing each time. When he filed again in 2000, he was 75, with an 8th-grade education and no lawyer to represent him.

At Jackson Kelly's request, he underwent an examination by Dr. George Zaldivar. The report that Zaldivar gave the firm included a narrative, an X-ray reading and the results of

lung-function tests. The narrative portion was a potential problem for the firm; it diagnosed Daugherty with complicated black lung. Because the report was from an exam, not a re-reading of existing evidence, Daugherty would know it existed; the firm couldn't withhold the entire thing. Instead, attorney Smoot removed the narrative portion and submitted the rest — a pile of forms and graphs that mean little to someone without the training to interpret them.

In 2004, however, attorney Cohen agreed to represent Daugherty, and he uncovered what Smoot had done. When Cohen raised the issue at a hearing, Jackson Kelly lawyer Dorothea Clark began to defend the firm's actions.

Administrative Law Judge Michael Lesniak cut her off. "[T]he point is, is that you withheld the report, Ms. Clark," he said. "And I could only assume that you didn't like what it had to say, so instead of paying the claim, you withheld the report. ... These are the sort of things we have to stop. And you can't win at any cost."

In the following months, Jackson Kelly continued to insist it had done nothing wrong. The head of the black lung unit, Bill Mattingly, argued, for example, that the firm hadn't actually taken apart the report because, although the narrative and technical findings had come in the same envelope, they weren't "attached."

Cohen contended Jackson Kelly's actions were part of a longstanding pattern. "[C]laimant suspects that this conduct has been applied on a widespread basis and may be responsible for the loss of black lung benefits by hundreds, if not thousands, of other claimants during the 30 year period that the Department of Labor has had jurisdiction to adjudicate cases under the Black Lung Benefits Act," he wrote in a December 2004 court filing.

Lesniak ordered Jackson Kelly to turn over any other evidence it had. The firm refused. He referred the case to a federal district court, which has contempt powers. That court concluded it didn't have jurisdiction but made it clear that it "in no way approves the conduct of Jackson Kelly lawyers." It referred the case to the West Virginia Office of Disciplinary Counsel.

The firm mounted a vigorous defense, paying a former administrative law judge to testify that there was nothing wrong with its actions. Ultimately, Smoot's license was suspended for one year. The West Virginia Supreme Court of Appeals called his actions "deceitful, dishonest" and "an affront to justice that simply cannot be tolerated." The court also found that Smoot "lacks remorse and has refused to acknowledge the wrongful nature of his conduct."

Three other Jackson Kelly lawyers — Mattingly, Clark and Snyder — were investigated but not sanctioned. Nonetheless, a panel of the Lawyer Disciplinary Board said it was "deeply troubled by the act of disassembling Dr. Zaldivar's report," which the three had defended but apparently had not participated in, and warned them, "[V]iolations of discovery orders in the future will evidence a pattern of behavior" inconsistent with good faith.

The case created a stir within the Office of Administrative Law Judges. The judge in charge of the black lung program sent an email praising Lesniak for "protecting the ethics and integrity of our court process." Another judge credited Lesniak with exposing "the unethical and unconscionable conduct of an attorney for Jackson & Kelly."

The Daugherty case was not isolated. Jackson Kelly had done essentially the same thing to miner Charles Caldwell almost a decade earlier, documents obtained by the Center show. Zaldivar had examined Caldwell and written a report diagnosing complicated black lung. Another lawyer at the firm appears to have done the same thing Smoot would do years later — removed the narrative and submitted the rest.

After the Daugherty case, the tone appeared to have shifted with some judges. Lesniak's words in a 2005 order evidenced growing concern: "I assume, then, I can expect more of the same from Jackson Kelly PLLC. ... I find [the firm's] defense of this practice ... to be ludicrous."

Culmination of longstanding battles

The progression of complicated black lung can be rapid and shocking. Gary Fox's decline began in 2008 as he and Cline were in the midst of their fight against Jackson Kelly. He and Mary spent most of their time in Pittsburgh, hoping the University of Pittsburgh Medical Center could find a suitable candidate for a lung transplant.

Terri worked as a nurse in Morgantown, W.Va., and called her parents every day. "He couldn't even carry on a conversation on the telephone," she said of her father. "He would get winded."

One day, a fire alarm went off at the house where he and Mary were staying in Pittsburgh. "He couldn't get down the steps. He had to slide down on his butt," Mary recalled. "He could not walk down."

By Christmas, Fox was on oxygen full-time, gaunt and pale. He was frequently hospitalized with respiratory infections he couldn't shake. Nurses told Mary he wouldn't sleep when he was alone in the intensive care unit. "He was scared to go to sleep," she recalled. "He'd jerk and wake up and see if I was still there. He thought that he would die in his sleep."

He managed to stay in contact with Cline. When Jackson Kelly conceded, the two had a decision to make: Would they take the assured benefits or push for Jackson Kelly to reveal any evidence it had?

Other miners had reached this point and settled, exhausted from years of fighting. In some cases, judges had considered the claim finished once the firm folded, denying requests to keep the case alive.

"We wanted to press on so they wouldn't do it no more. ... If it could help somebody else out, we needed to press on."

MARY FOX, RECALLING HER AND GARY'S DECISION TO PUSH FOR EVIDENCE FROM JACKSON KELLY

There were risks to continuing to push. Though Cline had strong suspicions, there were no guarantees Jackson Kelly actually had withheld evidence, let alone that it would be helpful. Perhaps the firm was fighting disclosure not because there was anything damning in Fox's case but because it wanted to preserve the right to withhold evidence in other cases. Suppose the judge ordered disclosure and there was nothing useful. Fox could lose.

Even assuming Jackson Kelly had withheld pathology reports in Fox's earlier claim, the only way to reopen that case and seek benefits dating back to the time of those readings would be to accuse the firm of "fraud on the court." This was an almost impossibly high bar to clear. Even using perjured testimony or fabricated documents wouldn't qualify. Cline would have to prove that Jackson Kelly had carried out an elaborate scheme that undermined the integrity of the system. And he, one man practicing out of his home, would have to do it against a large, savvy law firm.

"It's a big-deal allegation," Cline said recently. "And if I was wrong, then I've gone out on a limb. ... I lost a fair number of nights' sleep."

He discussed the options with Fox, leaving the choice to him. Gary and Mary talked it over and made a decision. "We wanted to press on so they wouldn't do it no more," Mary said recently. "We knew what we had gone through and what we were going through, and he just thought, if it could help somebody else out, we needed to press on."

For weeks, Cline traded blows with Jackson Kelly. Eventually, Burke ordered the firm to turn over any evidence it had withheld. On the day the judge had set as a deadline, attorney Ann Rembrandt faxed a set of documents to Cline and Burke. Included were the pathology reports of Drs. Naeye and Caffrey, emerging from Jackson Kelly's files after eight years.

Now on the defensive, Rembrandt argued that Jackson Kelly had done nothing wrong. The firm had no legal duty to disclose the reports to Fox, the judge or its own experts, she wrote in a brief. The firm's lawyers didn't know which doctors were right, just that they had different opinions, she said. Jackson Kelly, she wrote, "was free to make the litigation decision to use whichever opinion best supported its defense of the case."

On Feb. 9, 2009, Burke issued a decision that had been decades in the making. "Despite knowledge of the role pathology evidence played in the case, Employer continued to conceal the more probative reports of Drs. Caffrey and Naeye while emphasizing, and encouraging reliance upon, the report of [the hospital pathologist]," he wrote. "When Claimant's counsel attempted to bring evidence of Employer's conduct to light, Employer engaged in a course of conduct designed to conceal its actions; first denying the presence of the reports, then conceding liability to prevent their disclosure."

Burke agreed with what Cline had been arguing for years. "Surely, Employer must recognize a duty to provide accurate evidence to its expert witnesses," he wrote. "An expert's report cannot be considered to be solely a reflection of the evidence selected and provided by a party. If such were the case, an expert medical opinion could never be accepted as a reliable diagnosis."

The opinion was a repudiation of Jackson Kelly's aggressive approach to what is essentially a workers' compensation program, not high-stakes civil litigation with multi-million-dollar verdicts. "Employer's 'zealous' representation strategy instills uncertainty and cynicism into a program intended to compensate miners disabled from black lung disease," Burke wrote.

Overall, he determined, Jackson Kelly's behavior amounted to "fraud on the court." Burke reopened Fox's previous claim and awarded benefits dating to 1997. As it turned out, the firm also had withheld an X-ray reading by one of its radiologists finding complicated black

lung on an X-ray taken the year before Fox's biopsy, justifying an even earlier entitlement date in Burke's view. For the moment, it was an unprecedented win for Fox and Cline.

Today, that victory is uncertain. Jackson Kelly appealed, and the review board ruled in a split decision that the firm's actions had not reached the extraordinarily high level of "fraud on the court." The case is now before the U.S. Court of Appeals for the Fourth Circuit. Jackson Kelly contends it had no legal duty to disclose all of the evidence it developed, while Cline argues that the firm nonetheless had an ethical duty not to mislead Fox, the court and its own experts. The appeals court's decision could have profound implications not just for the Fox family, Cline and Jackson Kelly, but for generations of miners.

A last fight for breath

Less than two months after Burke's decision, Fox was admitted to the University of Pittsburgh Medical Center with a cough, breathlessness and chest pain. He had severe pneumonia, and the struggle to breathe strained his heart, which began to fail.

Easter Sunday came. Terri cooked a big meal and took it to the hospital, but Gary could barely eat. Doctors pulled Mary and Terri aside and asked, "What do you want done for him?"

Terri thought, *Why do I want him to sit here and suffocate to death?* They told the doctors to do all they could. "I was in complete denial," Terri recalled. "I really thought that he was going to get better and he was going to get the transplant and everything was going to be OK."

On Tuesday, April 14, 2009, Mary had an appointment with an eye doctor. "Just go," Terri told her. "He's going to be fine." Terri's husband, a cardiologist, came to stay with her and Gary.

At 2 p.m., his blood pressure dropped suddenly. Monitors sounded, and doctors ran into the room. At first, he responded to drugs, then his heart rate spiked.

When Mary returned, staff told her she couldn't go to Gary's room. She ignored them. Gary had needles in his chest and a tube in his throat. Doctors beat his chest violently in a final attempt to bring him back.

"They worked on him for a little over an hour," Terri said. "I was afraid of [my mom] seeing all that because it's pretty traumatizing. It's something that I've done several times, but when you see your own parent there lifeless and not responding at all I had to pull my mom back and tell her that it had been over an hour and, even if something did happen, that he wasn't ever going to be the same person."

At 3:34 p.m., the doctors stopped.

"I was there through the whole thing — them working on him and him dying right in front of me," Terri recalled. "I still have nightmares."

Now she thinks of all the things her father never got to see. She married in September 2009, five months after his death, walking down the aisle alone. Gary had desperately wanted a grandchild. After he died, Terri gave birth to a boy, Luke. Friends comment on the dimple that appears on Luke's left cheek when he smiles; it reminds them of Gary's.

The family shared a love of West Virginia University Mountaineers football. Terri went to every home game, and Gary went when he wasn't working. They'd park a few blocks from the stadium and walk. For the last few years of Gary's life, Terri noticed he'd have to stop and catch his breath. She started dropping him off next to the stadium.

In September 2009, Terri went to a game for the first time without her father, who had been buried with his WVU hat a few months earlier. The Mountaineers won 33-20. Terri just cried.

After his death, doctors opined that Gary's breathing problems caused his heart to fail, killing him. When a pathologist performed the autopsy, he saw extensive scarring and dark masses in his lungs.

It was undoubtedly complicated black lung. It always had been.

BREATHLESS AND BURDENED

Part 2 of 3

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JOHNS HOPKINS MEDICAL UNIT RARELY FINDS BLACK LUNG, HELPING COAL INDUSTRY DEFEAT MINERS' CLAIMS

Retired miner Steve Day, 67, needed supplemental oxygen 24 hours a day to breathe. He died July 2014 at age 67, still awaiting a decision in his case for federal black lung benefits. F. Brian Ferguson/Center for Public Integrity

Part 2 of a 3-part series, 'Breathless and Burdened: Dying from black lung, buried by law and medicine'

BREATHLESS AND BURDENED

Chris Hamby

Brian Ross

Matthew Mosk

INTRODUCTION

GLEN FORK, W.Va. — Across Laurel Creek and down a dirt road in this sleepy valley town is the modest white house where Steve Day grew up. For more than 33 years, it was where he recuperated between shifts underground, mining the rich seams of the central Appalachian coalfields and doing his part to help make Peabody Energy Corp. the nation's most productive coal company. Now, it's where he spends most days and nights in a recliner, inhaling oxygen from a tank, slowly suffocating to death.

More than a half-dozen doctors who have seen the X-ray and CT images of his chest agree he has the most severe form of black lung disease. Yet his claim for benefits was denied in 2011, leaving him and his family to survive on Social Security and a union pension; they sometimes turn to neighbors or relatives for loans to make it through the month.

The medical opinions primarily responsible for sinking his claim didn't come from consultants-for-hire at a private firm or rogue doctors at a fringe organization.

They came from a respected household name: the Johns Hopkins Medical Institutions.

Consulting fees in black lung cases flow directly to Johns Hopkins

The Johns Hopkins University often receives attention for its medical discoveries and well-regarded school of public health, and its hospital recently was ranked the nation's best by *U.S. News and World Report*.

What has remained in the shadows is the work of a small unit of radiologists who are professors at the medical school and physicians at the hospital. For 40 years, these doctors have been perhaps the most sought-after and prolific readers of chest films on behalf of coal companies seeking to defeat miners' claims. Their fees flow directly to the university, which supports their work, an investigation by the Center for Public Integrity and ABC News has found. According to the university, none of the money goes directly to the doctors.

Their reports — seemingly ubiquitous and almost unwaveringly negative for black lung — have appeared in the cases of thousands of miners, and the doctors' credentials, combined with the prestigious Johns Hopkins imprimatur, carry great weight. Their opinions often negate or outweigh whatever positive interpretations a miner can produce.

For the credibility that comes with these readings, which the doctors perform as part of their official duties at Johns Hopkins, coal companies are willing to pay a premium. For an X-ray reading, the university charges up to 10 times the rate miners typically pay their physicians.

Doctors have come and gone from the unit over the years, but the leader and most productive reader for decades has been Dr. Paul Wheeler, 78, a slight man with a full head of gray hair and strong opinions.

In the federal black lung system, cases often boil down to dueling medical experts, and judges rely heavily on doctors' credentials to resolve disputes.

When it comes to interpreting the chest films that are vital in most cases, Wheeler is the coal companies' trump card. He has undergraduate and medical degrees from Harvard University, a long history of leadership at Johns Hopkins and an array of presentations and publications to his credit. In many cases, judges have noted Johns Hopkins' prestige and described Wheeler's qualifications as "most impressive," "outstanding" and "superior." Time and again, judges have deemed him the "best qualified radiologist," and they have reached conclusions such as, "I defer to Dr. Wheeler's interpretation because of his superior credentials."

Yet there is strong evidence that this deference has contributed to unjust denials of miners' claims, the Center found as part of a yearlong investigation, "Breathless and Burdened." The Center created a database of doctors' opinions — none previously existed — scouring thousands of judicial opinions kept by the Labor Department dating to 2000 and logging every available X-ray reading by Wheeler. The Center recorded key information about these cases, analyzed Wheeler's reports and testimony, consulted medical literature and interviewed leading doctors. The findings are stark:

- In the more than 1,500 cases decided since 2000 in which Wheeler read at least one X-ray, he never once found the severe form of the disease, complicated coal workers' pneumoconiosis. Other doctors looking at the same X-rays found this advanced stage of the disease in 390 of these cases.
- Since 2000, miners have lost more than 800 cases after doctors saw black lung on an X-ray but Wheeler read the film as negative. This includes 160 cases in which doctors found the complicated form of the disease. When Wheeler weighed in, miners lost nearly 70 percent of the time before administrative law judges. The Labor Department does not have statistics on miners' win percentage in all cases at this stage for comparison purposes.

- Where other doctors saw black lung, Wheeler often saw evidence of another disease, most commonly tuberculosis or histoplasmosis — an illness caused by a fungus in bird and bat droppings. This was particularly true in cases involving the most serious form of the disease. In two-thirds of cases in which other doctors found complicated black lung, Wheeler attributed the masses in miners' lungs to TB, the fungal infection or a similar disease.
- The criteria Wheeler applies when reading X-rays are at odds with positions taken by government research agencies, textbooks, peer-reviewed scientific literature and the opinions of many doctors who specialize in detecting the disease, including the chair of the American College of Radiology's task force on black lung.
- Biopsies or autopsies repeatedly have proven Wheeler wrong. Though Wheeler suggests miners undergo biopsies — surgical procedures to remove a piece of the lung for examination — to prove their cases, such evidence is not required by law, is not considered necessary in most cases and can be medically risky. Still, in more than 100 cases decided since 2000 in which Wheeler offered negative readings, biopsies or autopsies provided undisputed evidence of black lung.

In an interview, Wheeler held strongly to his views. In his telling, he is more intellectually honest than other doctors because he recognizes the limitations of X-rays and provides potential alternative diagnoses, and he is adhering to a higher standard of medical care by demanding biopsies to ensure patients get proper treatment.

"I've always staked out the high ground," Wheeler said.

The university defended Wheeler, saying in a statement he "is an established radiologist in good standing in his field."

For decades, Dr. Paul Wheeler has led a unit of radiologists at Johns Hopkins who often are enlisted by the coal industry to read X-rays in black lung benefits cases. The Center for Public Integrity identified more than 1,500 cases decided since 2000 in which Wheeler was involved, reading a total of more than 3,400 X-rays. In these cases, he never found a case of complicated black lung, and he read an X-ray as positive for the earlier stages of the disease in less than 4 percent of cases. Subtracting from these the cases in which he ultimately concluded another disease was more likely, this number drops to about 2 percent.

University officials questioned the findings by the Center and ABC, requesting extensive documentation, which the news agencies provided. After initially promising responses, officials at Johns Hopkins did not answer most questions but instead provided a general written statement.

"To our knowledge, no medical or regulatory authority has ever challenged or called into question any of our diagnoses, conclusions or reports resulting from the ... program," the statement said.

After the Center and ABC again posed questions about documents showing that judges and government officials had challenged the opinions of Wheeler and his colleagues on numerous occasions, university officials sent the same statement again.

That statement also said, "In the more than 40 years since this program's inception, [Johns Hopkins radiologists] have confirmed thousands of cases to be compatible with [black lung]."

In some cases reviewed by the Center and ABC, Wheeler opined that an X-ray could be compatible with black lung but that another disease was more likely, ultimately grading the film as negative.

The news organizations asked the university how many times he had provided a truly positive reading; Johns Hopkins officials would not answer or clarify what they meant by “compatible.”

Judges at varying times have called Wheeler’s opinions “disingenuous,” “erroneous,” “troubling” and “antithetical to ... regulatory policy,” court records show.

One judge dedicated an entire section of his ruling to the Johns Hopkins specialists. Wheeler and two colleagues “so consistently failed to appreciate the presence of [black lung] on so many occasions that the credibility of their opinions is adversely affected,” Administrative Law Judge Stuart A. Levin wrote in 2009.

“Highly qualified experts can misread x-rays on occasion,” he wrote, “but this record belies the notion that the errors by Drs. Wheeler [and two colleagues] were mere oversight.”

But, to discredit his readings and award benefits to a miner, as Levin did, judges must identify a logical flaw or some other reason not to give his opinion greater weight than those of other doctors. Former judges said they knew certain doctors almost never found black lung, but said they were barred from taking these experiences in other cases into consideration. In four cases reviewed by the Center, judges who have questioned Wheeler have seen their decisions vacated by an appeals board.

Retired judge Edward Terhune Miller, who often saw Wheeler’s opinions in cases before him, said he sometimes was compelled to deny claims even when he had serious doubts about the opinions of coal-company experts from Hopkins and elsewhere. Miners often were unable to provide enough evidence to overcome these opinions, and he wasn’t allowed to take his personal knowledge of doctors’ tendencies into account. “That’s one of the frustrations in the process,” said the former judge. “There’s no doubt about it.”

Wheeler said he is sure miners who don’t have black lung are being wrongfully compensated. “They’re getting payment for a disease that they’re claiming that is some other disease,” the doctor said.

He takes issue with a law passed by Congress in 1969 that was crafted to lessen the burden of sick miners while limiting coal companies’ liabilities. Benefit payments for a miner start at just over \$600 a month and max out at about \$1,250 monthly for a miner with three or more dependents. Because these caps are low and miners are presumed to be at a particular risk for the disease, the system does not require they prove their cases beyond all doubt. Still, miners must show that they have black lung and that, because of it, they are totally disabled. About 85 percent of claims are denied at the initial level.

“I think if they have [black lung], it should be up to them to prove it,” Wheeler said. To him, this means undergoing a biopsy. If miners don’t submit to the procedure, he said, it suggests they may be afraid the results will show they have something other than black lung.

“I think if they have [black lung], it should be up to them to prove it.”

DR. PAUL WHEELER, RADIOLOGIST FOR JOHNS HOPKINS

Biopsies are rarely necessary to diagnose the disease and can put the patient at risk, according to the American Lung Association, the National Institute for Occupational Safety and Health (NIOSH), the Labor Department, a paper published by the American Thoracic Society and prominent doctors interviewed by the Center.

Told his higher standard of proof, which he maintains is ordinary medical practice, is not required by law, Wheeler held firm.

“I don’t care about the law,” he said.

To people in the southern West Virginia town of Glen Fork, he is “Steve” — longtime miner, father of three, Vietnam veteran. To Dr. Paul Wheeler, from his vantage 400 miles away, he was “Michael S. Day Sr.,” 58, another referral from corporate defense firm Bowles Rice LLP.

Wheeler has never been in a coal mine or met Steve Day. His opinion, though, proved crucial in Day’s case.

In 2004, after more than three decades in jobs that exposed him to high levels of dust, Day’s breathing worsened to the point his doctor urged him to get out of mining. In January 2005, he filed a claim for federal black lung benefits.

The Labor Department pays for a medical examination by a doctor from an approved list. Day unwittingly chose a doctor who commonly testifies for coal companies, yet even this physician diagnosed the most advanced stage of complicated black lung.

Then the opinions from Johns Hopkins began arriving.

This image, taken from a 2012 CT scan of Steve Day, shows a large mass in each lung. Dr. John E. Parker, who used to run the government’s X-ray surveillance program, says they represent a classic case of complicated black lung.

A CT scan interpretation by Dr. John Scatarige, who is no longer at the university: Large masses in the lungs, probably tuberculosis, or maybe a fungal disease, or cancer. Black lung unlikely.

Two X-ray readings by radiologist William Scott Jr., with the university since the early 1970s: Large masses in the lungs, probably tuberculosis. Black lung unlikely.

And, most vitally, three X-ray readings and a CT scan interpretation by Wheeler: Large masses in the lungs, probably tuberculosis, histoplasmosis or a similar disease. Black lung unlikely.

Peabody subsidiary Eastern Associated Coal Corp.’s chosen pulmonologist to review the evidence, Dr. Robert Crisalli, originally found black lung but changed his opinion after seeing Wheeler’s interpretations. He adopted most of Wheeler’s views and testified, “The basis for the conclusions primarily centers around the imaging, including the CT scans.”

Day lost.

A spokesman for Peabody spinoff Patriot Coal Corp., which now owns the subsidiary that employed Day, declined to comment, as did a spokesperson for Peabody.

Like many miners, Day relied primarily on the opinion of the doctor who examined him for the Labor Department and the records from his treatment over the years. He was at a distinct disadvantage, squared off against the radiologists at Johns Hopkins.

In determining Day didn't have black lung, the Johns Hopkins experts relied on the same criteria they have recited in countless cases reviewed by the Center. Put simply, the white spots that show up on film must have a particular shape, appear in a specific area of the lung and follow a specific pattern.

At the Center's request, a physician not involved in the case, Dr. John E. Parker, reviewed Day's X-rays and CT scans taken between 2003 and 2012. Parker worked at NIOSH for 15 years, much of the time as director of the X-ray surveillance program and the program to certify qualified readers. He is now chief of pulmonary and critical care medicine at the West Virginia University School of Medicine, and travels the world teaching doctors to read X-rays in seminars, many for NIOSH and the American College of Radiology.

Parker was told only Day's name, age, number of years mining and the fact that the interpretation of the films was disputed.

His clear-cut conclusion: Complicated black lung. "Based on my findings in reviewing this case, and the classic nature of the medical imaging and history, I am deeply saddened and concerned to hear that any serious dispute is occurring regarding the interpretation of his classically abnormal medical imaging," Parker wrote. "If other physicians are reaching different conclusions about this case ... it gives me serious pause and concern about bias and the lack of scientific independence or credibility of these observers."

Told later that Day had lost his case, Parker was taken aback.

"It breaks my heart," he said. "This man has been victimized twice — once by the conditions that allowed him to get this disease and again by a benefits system that failed him."

Johns Hopkins experts help defeat hundreds of claims

The Center's review of thousands of cases suggests there are many more men like Day. Since 2000, miners have lost more than 800 cases after at least one doctor found black lung on an X-ray but Wheeler read it as negative. This includes 160 cases in which other doctors saw the complicated form of the disease.

George Hager, for example, worked in the mines for 37 years, and three doctors saw complicated black lung on his X-rays and CT scan. Three Johns Hopkins radiologists, including Wheeler, saw something else — perhaps tuberculosis or histoplasmosis. The judge noted the affiliation of the Johns Hopkins doctors and their "superior qualifications." Hager lost.

Douglas Hall's 27 years underground came to an end at the advice of his doctor; he couldn't walk 100 feet without struggling for breath. Four doctors read his X-rays as complicated black lung, but, again, three Hopkins radiologists, Wheeler among them, graded them as

negative, finding tuberculosis or histoplasmosis more likely. Though tests for both diseases came back negative, Hall lost.

Keith Darago initially won twice. Three doctors saw complicated black lung on his X-rays and CT scans, and Administrative Law Judge Linda Chapman rejected attempts by the three Johns Hopkins radiologists to attribute the masses on the films to tuberculosis or a similar disease, particularly given Darago's negative tuberculosis test and lack of history of any other disease.

But the Benefits Review Board, the highest appeals court in the administrative system, vacated the award of benefits twice and, at the coal company's lawyers' request, referred the case to a different judge. This time, the judge found the evidence on film to be a wash. Darago lost.

Some miners or their surviving family members continue to file claims, occasionally winning after their disease worsens or they die. Others simply give up, tired of fighting.

"I think it's a bad deal," said Rodney Gibson, another miner whose case followed a similar pattern. All the evidence of complicated black lung he presented wasn't enough. "They come out with a way of getting around it somehow," he said.

'Not using the system properly'

Wheeler flips a switch, and a tall panel hums to life, emanating a white glow in the dark corridor where the Pneumoconiosis Section, as the group of Johns Hopkins radiologists is known, does its work. Papers bearing the letterhead of prominent corporate defense law firms sit at work stations, and stacks of folders in a storage closet have names of firms and coal companies written in Sharpie on their sides.

Wheeler places a series of chest X-rays against the panel and describes what he sees.

Small white spots obscure much of the lungs on one film, but they don't have the centralized "birdshot pattern" he's looking for. "I'd classify it as compatible with coal workers' pneumoconiosis," he says. "But I'd also say it certainly could be or more likely is histoplasmosis."

He moves to films showing large white masses. One doesn't have small spots surrounding it and is "pretty high [in the lung] — I would call it out of the strike zone," he says. He again suspects the fungal infection. "If you want to bet against histoplasmosis, you're going to lose an awful lot," he says.

These X-rays, however, are not disputed films in a benefits case. They are the standard X-rays that the government says show pneumoconiosis — a family of disease that includes black lung and asbestosis, but not histoplasmosis, tuberculosis and similar illnesses. When reading for pneumoconiosis, government-certified readers are supposed to place the unknown X-ray next to these films; they are classic cases meant to be standards for comparison.

Wheeler questions this and says the classification system has "some quality issues." He adds, "These are not proven."

Experts like Wheeler must pass an exam every four years to retain their government certification. If a doctor were to classify these films as negative during that exam, the

physician very likely would fail, said David Weissman, director of NIOSH's Division of Respiratory Disease Studies, which sets the standards for how readings should be performed.

Wheeler, however, has continued to pass the exam for decades, most recently this April.

The form used in the U.S. and many other countries for interpreting X-rays contains boxes to grade what's on the image and a comments field for further explanation. If spots appear on the X-ray, a reader is supposed to mark their size and shape, and then explain which diseases seem more or less likely.

When he reads X-rays for coal companies, however, Wheeler doesn't do this. If he sees spots on the film but thinks another disease is more likely than black lung, he marks the film as negative. He typically describes the abnormalities in the comments section, explaining why they don't meet his criteria for finding black lung. In case after case reviewed by the Center, his comments were almost identical.

Weissman said this approach is simply wrong.

"You're supposed to grade what's there," Weissman said. "You're not supposed to alter what the grade is based on what you think the underlying cause is. That's not using the system properly."

In a statement, university officials said the radiologists "adhere to the clinical standards of diagnosis noted in the guidelines" put forth by the International Labor Organization, upon which NIOSH relies.

Wheeler said he is being more responsible than other doctors by providing multiple possible diagnoses. He often grades the film as negative but says in the comments section that black lung is possible, but unlikely.

The practical effect of Wheeler's readings: To rule out black lung. Judges may consider the comments he writes, but the key, in comparing Wheeler's readings with others, is the negative numerical grade he assigns.

In depositions, he sometimes goes further to eliminate black lung as a cause of a miner's failing health. "He doesn't have [black lung]," he said in a 2004 case, for example. "[I]n no way is this [black lung]," he said in another.

Weissman said NIOSH often hears that some certified readers interpret X-rays the way Wheeler does and that others over-diagnose diseases. "It's pretty frustrating sometimes when we hear of people that do well on the exam and then go out in the real world and do other things," he said. "Absolutely that is a concern."

The agency's authority, he said, doesn't go beyond education, training and administering the exam. People with complaints should contact the state medical board, he said.

No, by the numbers

There is an unmistakable pattern in Wheeler's readings. The Center identified more than 1,500 cases decided since 2000 in which Wheeler read at least one X-ray; in all, he interpreted more than 3,400 films during this time.

The numbers show his opinions consistently have benefited coal companies:

- Wheeler rated at least one X-ray as positive in less than 4 percent of cases. Subtracting the cases in which he ultimately concluded another disease was more likely, this number drops to about 2 percent.
- In 80 percent of the X-rays he read as positive, Wheeler saw only the earliest stage of the disease. He never once found advanced or complicated black lung. Other readers, looking at the same images, saw these severe forms of the disease on more than 750 films.
- Where other doctors saw black lung, Wheeler saw tuberculosis, histoplasmosis or a similar disease on about 34 percent of X-rays. This number shoots up in cases in which others saw complicated black lung, which is so severe it triggers automatic compensation. In such cases, Wheeler attributed the masses in miners' lungs to these other diseases on two-thirds of X-rays.

Asked if he stood by this record, Wheeler said, "Absolutely."

"I have a perfect right to my opinion," he added. "I found cases that have masses and nodules. ... In my opinion, those masses and nodules were due to something more common."

When his views are questioned, Wheeler often shares anecdotes. He tells the story of performing an autopsy during his residency on a woman thought to have breast cancer; his examination revealed undetected tuberculosis. Other common stories include his father's severe illness from histoplasmosis and a colleague's bout with the infection after spending a rainy night in an abandoned chicken coop.

In a case decided in 2010, a doctor disputed Wheeler's narrow view of black lung, and the miner's lawyer asked Wheeler during a deposition whether he could cite medical literature to support his views.

"I don't think I need medical literature," Wheeler replied.

In a 2009 letter submitted in another case, Wheeler questioned two doctors who read X-rays as positive for black lung and wrote that he and a colleague who had provided opinions in the case "are clinical radiologists at one of the two or three best known hospitals in the world."

The judge was not impressed. "This self-serving, egotistical diatribe is unwarranted and very unprofessional," he wrote.

Wheeler took a similar approach in a recent interview, challenging the views of any doctor, judge or organization — including the Labor Department, NIOSH and the International Labor Organization — that contradicted his. He said he's never been told an interpretation of his was wrong and he'd admit a mistake only if a biopsy or autopsy showed black lung — and was performed by a pathologist with "proper credentials."

"I know my credentials," he said. "I'd like to make sure that the people proving me wrong ... have ... credentials as good as mine."

Proof in the tissue

In fact, tissue samples from miners' lungs have proven Wheeler wrong again and again.

The pathologists providing the interpretations were enlisted by the coal company in many cases, and they often came from well-regarded academic medical centers, such as Washington University in St. Louis and Case Western Reserve University, where Wheeler himself was a resident. Some helped write widely accepted standards for diagnosis of black lung with pathology and have been frequent experts for companies defending claims.

Wheeler's readings were negative even in some cases in which the company conceded the miner had black lung and chose to fight the claim on other grounds.

When clear pathology evidence did exist in cases reviewed by The Center, it tended overwhelmingly to show that the doctors who had found black lung — not Wheeler — were correct.

The American Lung Association, NIOSH, the Labor Department and a paper published by the American Thoracic Society say black lung usually can be diagnosed with an X-ray, knowledge of the miner's exposure to dust and studies of lung function. Biopsies, which Wheeler insists are "very safe," are invasive, risky and usually unnecessary, government officials and doctors said.

Still, of the cases in which Wheeler submitted at least one negative reading, miners or their surviving family members submitted evidence from a biopsy or autopsy in more than 280 cases, a Center analysis found. Contrary to Wheeler's contentions, the pathology did not resolve most cases. In about half, the tissue evidence proved inconclusive or was disputed.

Of the remaining cases, 75 percent revealed undisputed evidence of black lung. In the other cases, the tissue did not show evidence of the disease, but, as the law states, this doesn't mean the miner didn't have black lung — only that it wasn't present on the piece of lung sampled.

In the cases in which pathology showed Wheeler was wrong, other X-ray readers saw black lung 80 percent of the time, and no interpretations outside of Johns Hopkins existed in another 12 percent.

Most times, then, only Wheeler and his Johns Hopkins colleagues failed to see black lung.

Diagnosis after death

Sometimes miners had to die to prove they had black lung.

George Keen worked 38 years in the mines and tried for 22 years to win benefits. At least two physicians interpreted his X-rays and CT scans as showing complicated black lung. Wheeler and his colleague Scott read them as negative — probably tuberculosis, they said. Keen lost.

Three years after the most recent X-rays and CT scans read by Wheeler were taken, Keen died. The company's chosen pathologist agreed the autopsy revealed complicated black lung.

John Banks, who started loading coal by hand at 17, had multiple claims denied. More than a half-dozen doctors saw black lung; Wheeler suspected cancer. When Banks died, pathologists looking at his lung tissue debated whether the disease had reached the complicated stage, but both sides agreed: He had black lung.

Emily Bolling suffered through much the same experience with her husband, Owen, who spent most of the last six years of his life on oxygen but wasn't able to win benefits.

"They would keep hiring more doctors and more doctors to read his X-rays, and we had just one," she said.

Wheeler read a 2002 X-ray as negative. Owen died in 2003, and two pathologists found that the autopsy showed black lung, allowing Emily to win her widow's claim. "It seems awful, but that's what it took," she said recently. "It's just wrong."

Illene Barr is trying to win benefits following the 2011 death of her husband, Junior, who worked 33 years doing some of the dustiest jobs in the mines. In his final years, his health progressively worsened. "He loved to do things around the house," Illene recalled. "He had a garden. But he became so short-winded he couldn't do any of that. He ended up basically just sitting on the deck."

He lost claims in 2008 and 2010 after Wheeler read X-rays as negative, saying histoplasmosis was much more likely.

"We just couldn't believe that it was happening," Illene said.

Four months after Wheeler's most recent opinion that Junior likely was suffering from the bird-and-bat-dropping disease, he died. Pathologists for both sides saw black lung on the autopsy. Illene's benefits case is pending.

The Wheeler standard

Wheeler learned the strict criteria he applies from his mentor, Dr. Russell Morgan, a revered figure at Johns Hopkins. In the early 1970s, Morgan helped NIOSH develop the test to qualify as a "B reader" — a doctor certified to read X-rays for black lung and similar diseases. Wheeler served as one of his test subjects. The radiology department bears Morgan's name, and he went on to become dean of the medical school.

Morgan testified for companies defending a wave of lawsuits over asbestos-related disease. Wheeler testified before Congress in 1984, arguing that false asbestos claims were rampant and that plaintiffs should prove their cases by undergoing a biopsy. He asserted that similar problems existed in the black lung compensation system.

There is general acknowledgement now that X-ray evidence was misused in some asbestos claims. The black lung benefits system of today, however, is a different universe.

In some asbestos claims, plaintiffs won large verdicts or settlements, and lawyers got rich. For black lung, the payouts are comparatively meager — the maximum monthly payment, for miners with three or more dependents, is about \$1,250 — and few lawyers will take cases because the odds of winning and ultimate compensation are low. Settlements are not allowed, and miners have to prove total disability caused by black lung, not just show a minimally positive X-ray.

Wheeler continues to express concerns similar to those he voiced in 1984. "It comes down to ethics," Wheeler said. "If you think it's appropriate for somebody with sarcoid to be paid for [black lung] because he has masses and nodules — do you think that's appropriate? I don't think so."

After Morgan's death, Wheeler took over the "Pneumoconiosis Section." Asked if he viewed himself as the coal industry's go-to radiologist, Wheeler said: "Dr. Morgan was the go-to guy. ... I've replaced him ... in the pneumoconiosis section, yes. ... I can view myself as the doctor for a number of companies, not just coal companies."

In depositions and during the recent interview, Wheeler has insisted he is relying on the criteria Morgan taught, praising his predecessor as an innovator and genius. His criteria, however, do not comport with mainstream views on black lung.

"When you take this very strict view, where you put in all these rules, none of which are a hundred percent, what will happen is you'll wind up excluding people that have the disease," NIOSH's Weissman said.

According to medical literature and experts consulted by the Center, black lung does not always fit the narrow appearance Wheeler requires. Shown a text, for example, that says the disease may affect one lung more than the other, Wheeler said: "I don't know where they get this idea. ... It's not what Dr. Morgan taught me."

In fact, the statement comes from the standards established in 1979 by the College of American Pathologists. The report was compiled by a group of eminent doctors, including some who have testified regularly for coal companies.

Doctors interviewed by the Center said they had seen many cases of black lung that did not fit Wheeler's standards. "You'll see a variety of different presentations," said Dr. Daniel Henry, the chair of the American College of Radiology's task force on black lung and similar diseases. "The image can vary."

In one case decided in 2011, NIOSH got involved at the request of the doctor who examined the miner for the Labor Department. Multiple doctors had diagnosed complicated black lung, but Wheeler had read X-rays as negative. The spots on the X-rays didn't follow the pattern he wanted to see, he'd said; histoplasmosis was more likely.

Two NIOSH readers, however, saw complicated black lung on the film, and Weissman wrote a letter saying Wheeler's views "are not consistent with a considerable body of published scientific literature by NIOSH." The miner won his case.

Assumptions and 'bias'

A pair of assumptions shapes Wheeler's views in ways that some judges and government officials have found troubling.

Former miner Gary Stacy's struggle for benefits lays bare the effects of these beliefs.

When he filed for benefits in 2005, Stacy was only 39 years old, yet three doctors believed his X-rays and CT scans showed complicated black lung. He had worked for almost 20 years underground and had never smoked.

Wheeler, however, read two X-rays as negative. He wrote that Stacy was "quite young" to have complicated black lung, especially since the 1969 law required federal inspectors to police dust levels. Histoplasmosis was much more likely, Wheeler thought.

A judge denied Stacy's claim in 2008, and it would take years of fighting and a rapid decline in his breathing before he won.

In reaching his conclusions about the cause of the large masses in Stacy's lungs, Wheeler drew upon beliefs that pervade his opinions: Improved conditions in mines should make complicated black lung rare; whereas, histoplasmosis is endemic in coal mining areas. In case after case, Wheeler has said complicated black lung was found primarily in "drillers working unprotected during and prior to World War II."

Wheeler's contention contradicts a series of published studies by NIOSH researchers showing that the prevalence of black lung actually has increased since the late 1990s and that the complicated form increasingly is affecting younger miners. Wheeler contends these peer-reviewed studies aren't conclusive because they have not been confirmed by pathology.

Gary Stacy is the kind of miner NIOSH says it now sees more often. Just 47 today, he appears trim and healthy, but a few minutes of conversation reveal a different reality. His sentences are interrupted by hoarse gasps for breath.

Stacy now undergoes pulmonary rehabilitation to prepare for a lung transplant. As his illness worsened, the evidence became overwhelming, and his employer agreed to pay benefits.

The fact that nothing in Stacy's medical history indicated he'd suffered from histoplasmosis or tuberculosis didn't prevent Wheeler's readings from being credited in the 2008 denial. Someone could be exposed, show no symptoms and still develop masses that remain after the infection has fizzled out, Wheeler often has said.

This is theoretically possible, said doctors consulted by the Center, including an expert on histoplasmosis at the Centers for Disease Control and Prevention. But, doctors noted, in cases with masses as large as the ones Wheeler often sees on film, the patient likely would show symptoms and have some record of the disease in his medical history.

NIOSH's Weissman said the two diseases should rarely be confused on film. "The appearance of [black lung] is different from the typical appearance of ... histoplasmosis," he said. "That shouldn't be hard, in general, to make that differentiation."

Wheeler's main alternative suggestion once was tuberculosis, but he has switched to suggesting histoplasmosis more often. "Well, initially, I thought TB was ... causing these things," he said in an interview. Yet many of those cases, he now believes, "very likely were [histoplasmosis]."

Could he be wrong again? "I could be," he said. "But I'd like to be proven wrong with biopsies."

In written opinions, judges have said Wheeler's assumptions seem to have "affected his objectivity" and "inappropriately colored his readings." Another wrote in 2011 that Wheeler had a "bias against a finding of complicated [black lung] in 'young' individuals."

In some cases, judges have questioned Wheeler's demands for biopsy proof and his speculative suggestions of other diseases. "The reasonable inference to be drawn from Dr. Wheeler's report and testimony is that he does not accept a diagnosis of [black lung] based on x-ray or CT scan alone," one judge wrote in 2010.

Another judge succinctly summarized Wheeler's opinion: "I don't know what this is, but I know it's not [black lung]."

Retired miner Steve Day and his family outside their home in Glen Fork, W.Va. (ABC News)

Steve Day, 67 F. Brian Ferguson/Center for Public Integrity

Scraping to get by, struggling to breathe

Steve Day's wife, Nyoka, sleeps lightly. Most nights, they re-enact the same scene.

Steve sleeps upright in a recliner; if he lies flat, he starts to suffocate. Nyoka lies in bed in the next room over, listening to his breath and the hiss of the machine pumping oxygen through a tube in his nose. She waits for the sound — a faint gasp.

"I hurry in here, and I bend him over and say, 'Steve, cough,' " she said. "He'll try and get by without having to cough because it hurts. And I make him cough. I'll scream at him, 'Cough!' "

What finally comes up is often black. They've made it through another night.

This is not the life they envisioned when Steve returned from Vietnam and they eloped. Both of their fathers had worked in the mines, and both had black lung. Before they got married, Steve made Nyoka a promise: He'd never go to work in the mines.

It wasn't long before he changed his mind, persuaded by his father. "He said that's the only way you can make good money," Steve recalled of the job that, in good years, earned him as much as \$55,000 or \$60,000. He worked just about every job underground. For much of his career, he ran a continuous mining machine, which rips through coal and creates clouds of dust.

"When he came out of the mines, all you could see was his lips, if he licked them," Nyoka recalled. "He was black except around his eyes."

After 33 years in the mines, he thought the cause of his breathing problems was obvious. So did his doctor, who is treating him for black lung.

The reports from Johns Hopkins floored Steve and Nyoka. There was nothing in his medical records to suggest he'd ever had tuberculosis or histoplasmosis, let alone a case so severe that it left behind multiple nodules and masses, including one occupying almost a third of one of his lungs.

Steve scowls at the mention of Wheeler's name. "The more I talk about him the madder I get," he said. "And the madder I get, my blood pressure shoots up."

Administrative Law Judge Richard Stansell-Gamm determined, based on the opinions of Wheeler and the pulmonologist who adopted most of Wheeler's findings, that Day had not proven he had black lung. The judge didn't come to any conclusions about what caused Day's severe illness.

He lost his case on May 31, 2011, and, three days later, the Labor Department sent Day a letter demanding \$46,433.50. The department had originally awarded Day's claim in 2005 and started paying benefits from a trust fund because the company's lawyers had appealed.

Now that the initial award was overturned, the department wanted reimbursement for what it paid out during the six years it took for the case to reach a conclusion.

The department eventually waived the so-called "overpayment" after Day submitted documentation showing he had to support, to varying degrees, eight other people with only Social Security and a union pension.

"Each person of age tries to help but overall it isn't enough to survive on without borrowing," he wrote the department. "It has been very humiliating to have to do so, when everyone knows that I worked my life away from my children and my wife, in order to end up on full time oxygen for a company who isn't (decent) enough to acknowledge the damage 'their' job done to my body, my life, and my family."

Day has not given up hope of winning benefits, but, if he files again, he could find himself again having to overcome the opinions of Wheeler and his colleague at Johns Hopkins.

As he almost always does, Wheeler testified in Day's case that he should undergo a biopsy. Parker, the former NIOSH official who examined Day's X-rays and CT scans, said he'd advise against a biopsy because the risk of complications for someone with Day's level of disease is too great.

That leaves just one way, in Wheeler's opinion, to disprove him. Steve and Nyoka have already discussed it. "I done told her, 'If something happens to me, have an autopsy done on my lungs,' " Steve said.

Since he lost his case, Day's breathing has declined. He began full-time oxygen a year ago, but decided against a lung transplant. At 67, with his health problems, he likely would not be a good candidate.

Miners have developed a crude measure for how damaged their lungs are based on how upright they need to be to sleep.

"You start out with one pillow," Nyoka said. "Then you go to two pillows. Then three pillows, and that's supposed to be your top. Well, he went through that, and he got to where he couldn't breathe. So he got in the recliner, and he's just lived in that recliner for ..."

"Years," Steve interjected, staring out the window toward the tree-lined hillside.

"And now the recliner," Nyoka said. "It's not enough."

Part 3 of 3

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AS EXPERTS RECOGNIZE NEW FORM OF BLACK LUNG, COAL INDUSTRY FOLLOWS FAMILIAR PATTERN OF DENIAL

Miner Ted Latusek (second row, second from right) with the mine rescue team at the Robinson Run mine, now owned by Consol Energy, in northern West Virginia in 1988. He is wearing another miner's uniform, which doesn't bear his name. Courtesy of Ted Latusek

Part 3 of a 3-part series, 'Breathless and Burdened: Dying from black lung, buried by law and medicine'

Chris Hamby

INTRODUCTION

Ted Latusek has black lung disease. For almost two decades, his breathing has been so bad he's been considered totally disabled. Even his former employer, the coal giant Consol Energy, does not dispute those points.

Nineteen years after he first filed for federal black lung benefits, however, his case remains unresolved. What's really causing his impairment, doctors testifying for Consol contend, is a completely different and unrelated disease. To win his case, the former miner must show that his disability is caused by black lung.

Though parts of his lungs show the dark nodules typical of the classic form of black lung, all doctors agree that his biggest problem is elsewhere, in the parts of his lungs that show severe scarring with a different pattern.

His case file, spread in piles, covers a conference table, but all of the medical reports, depositions, hearings, briefs and rulings center on one question: What caused the abnormal scarring that has consumed large portions of his lungs?

The fight over the answer to that question goes to the heart of the newest battle in a longstanding war between companies and miners. Latusek's legal tussle is the signal case in the latest effort by the coal industry to deny emerging scientific evidence and contain its liabilities, a strategy that has played out repeatedly over more than a century and locked

multitudes of miners out of the benefits system, the Center for Public Integrity found as part of the yearlong investigation, “Breathless and Burdened.”

Consol has hired radiologists, pathologists, pulmonologists and a statistician to examine Latusek, write piles of reports and attack a growing body of medical literature. His disease, they maintain, is a rare illness that appears in the general population and causes lung damage with the appearance seen in Latusek. The cause is unknown, but, they say, it definitely isn’t coal mine dust.

Yet medical evidence increasingly has shown his pattern of scarring to be a previously unrecognized form of black lung.

Broad recognition of the illness’ connection to coal mine dust could have significant financial implications for coal companies. The Center identified more than 380 benefits cases decided since 2000 in which the miner had evidence of this atypical presentation, and studies have shown the disease pattern to be present in at least 15 percent of some groups of miners examined.

Since Latusek first filed his claim in 1994, research increasingly has shown that coal and silica — the toxic mineral in much of the rock in mines — can cause the pattern of scarring he has. Government researchers at the National Institute for Occupational Safety and Health (NIOSH) and the National Institutes of Health (NIH), as well as other independent doctors, have linked the pattern to coal mining.

“It’s certainly related to their work,” said David Weissman, head of NIOSH’s division of respiratory disease studies. “We’re confident of that.”

Yet, while other variants of black lung are defined explicitly in Labor Department regulations, Latusek’s form is not, and doctors paid by the coal industry continue to testify that there is no evidence of any connection between mining and this form of disease. This leaves the complex medical issue to be argued case by case in the benefits system, which is often ill-equipped to address emerging science and typically favors coal companies and the well-paid consulting doctors they enlist.

A Labor Department spokesman said the agency doesn’t think a regulation formally recognizing the form of disease as a type of black lung is necessary. Current rules, the spokesman noted, allow miners to attempt to prove a relationship between their work and this variety of illness.

Experts interviewed by the Center, however, argued that explicitly stating such a relationship would lessen miners’ burden, pointing to a previous rulemaking as a model. In hundreds of cases reviewed by the Center, miners with a disease pattern like Latusek’s have faced particular challenges in proving their cases.

Latusek, a coal miner’s son who grew up in an area of northern West Virginia dominated by Consol, has won four times before an administrative law judge, but appeals courts have vacated or reversed the decision each time.

Consol did not respond to requests for comment.

While courts have grappled with the complexities his case presents, Latusek’s health has deteriorated. He has gone on oxygen and endured a lung transplant. The doctor who

originally treated him on referral from Consol has testified against him twice, and many of the industry's go-to consultants have weighed in.

Yet he and his lawyer — the daughter of a coal miner who has toiled more than half her career on Latusek's case despite rules barring her from collecting a cent in fees until the case closes — press on.

"I know my case is going to set a precedent," Latusek said.

"There is nothing in mining that makes it insanitary, and any insanitary conditions which may exist are doubtless closely related to the rum shop."

JOHN FULTON, ENGINEER AND COAL INDUSTRY REPRESENTATIVE, 1901

"Black lung" is not just one disease. Rather, it is a blanket term for a variety of lung diseases caused by breathing coal dust. As science has implicated coal dust as the cause of an increasing array of medical problems during the past century, coal companies have resisted, knowing broader recognition of the true effects of mining coal could place them on the hook for compensating more sick miners.

The coal industry's reaction to the potential expansion of its liabilities has followed a familiar pattern. For more than a century, the industry has sought to keep a narrow definition of black lung.

In the early 20th century, coal companies and sympathetic doctors argued that coal dust was harmless and actually protected miners' lungs from tuberculosis.

Since then, scientific advances have shown that breathing coal dust can harm different people in different ways.

One miner might develop the black nodules characteristic of coal workers' pneumoconiosis, the classic form of black lung. Another might find the air sacs in his lungs destroyed — emphysema — or the lining of his airways irritated and blocked — chronic bronchitis.

As the effects of coal dust have gained broader recognition, the industry in each instance eventually has had to accept the evidence. But, while these fights about classification have played out, sick miners have found it difficult, if not impossible, to win benefits.

Today, miners again are facing this strategy of denial and containment, this time over the pattern of scarring seen in the lungs of Latusek and hundreds of other miners with cases decided since 2000. In virtually all of the more than 380 cases identified by the Center, a doctor testifying for the coal company — or, in many cases, multiple doctors — blamed some variant of the disease idiopathic pulmonary fibrosis, known as IPF, or a similar illness. This is the same scarring of unknown cause that Consol's doctors say Latusek has. Miners lost more than 60 percent of these cases. Even when judges awarded benefits, the decision often hinged on an issue other than recognition of the abnormal disease appearance as black lung. Numbers on the success rate of miners at this level in all cases were not available for comparison.

In many cases, judges credited coal company experts and reached medical conclusions that flatly contradict the views of NIOSH and NIH. Judges must rely on whatever evidence a miner can produce, and finding doctors who can rebut the vehement assertions of the company's experts can be a challenge.

The particulars of Latusek's case offer a rare and nearly ideal opportunity to isolate the key question that could affect the claims of many other miners: Does coal mine dust cause his form of disease? Latusek never smoked. He doesn't have an autoimmune disease. He never underwent radiation treatment or took certain toxic drugs. He has no family history of the disease.

In other words, doctors can't blame his illness on these other potential causes. What he does have is a history of intense exposure to the potent mixture of dust generated by the most powerful machinery of modern mining.

Latusek's path to the mines was undeterred by the warnings of his father, who worked underground. "He never wanted me to go to the mines," Latusek said. "He knew how dirty and dusty and dangerous it was."

Aside from mining, though, there weren't many well-paying jobs in the area of northern West Virginia, near the town of Fairview, where Latusek and his older sister grew up. Consol's mines dotted the landscape, tapping the rich Pittsburgh coal seam; the company remains one of the nation's top five coal producers today.

Ted Latusek examines the hydraulic roof support — designed to prevent a cave-in on a longwall section — at a plant in England in 1993. Courtesy of Ted Latusek
Latusek worked from the time he was 13, shedding his boyhood shyness as he carried out groceries from the local market and chatted up customers.

He breezed through high school, but found himself unprepared for the more rigorous workload at nearby Fairmont State University, especially with the two jobs he was working. After two years, he dropped out and went full time for a utility company that dug ditches and installed the power lines feeding into Consol's mines.

When he was laid off, he applied to work for Consol. In September 1970, he went underground, handling a variety of jobs. "I worked there about three months, and then Uncle Sam said it was my time to go," he recalled

Drafted into the Army, he received training in electronics and ended up stationed as a technician at a satellite communication site in New Jersey. He narrowly missed being sent to Vietnam. In July 1971, he married Donna, whom he'd met while at Fairmont State, and, six years later, they would have a daughter, Jennifer.

In December 1972, he returned to the mines. He quickly ascended the ranks, becoming a maintenance foreman and eventually longwall coordinator. This meant that, at 29, he was in charge of a crew running the massive moneymaking machine. A longwall's spinning shearer can hollow out mountains in little time. Consol made sure everyone knew the value of production, Latusek said: Every minute the machine wasn't running cost the company \$12,000.

He took pride in motivating his crew, keeping his own logs of production and comparing them with those of other shifts. "We actually outmined the other crews two to one," he said.

Before long, he was promoted again; the company placed him in charge of all the longwalls at two mines. He sometimes would travel to Great Britain to see the factories that manufactured the machines, and he was always on call, once working 78 straight days. Another time, he spent virtually an entire week underground, coming up for a couple of hours a day to shower, eat and sleep.

At times, he lived in clouds of dust, he recalled. The roof would cave in, and his crew would have to cut through rock for days on end. Or the exit would be blocked by falling rock, rendering any attempt at ventilation pointless. "A lot of times, you couldn't see your hand in front of your face," he recalled.

Latusek's health problems first began to surface in 1989. He was short of breath, and he coughed constantly. A company physical turned up "one area of concern," as Consol's doctor put it, in 1990. The company referred him to a specialist, Dr. Joseph Renn III.

Latusek didn't know it at the time, but Renn frequently testified for coal companies defending black lung claims. He would later abandon his private practice and start a consulting firm, working almost exclusively for companies defending claims of occupational lung disease.

Renn diagnosed IPF. The reasoning behind the diagnosis is one that Renn and other doctors have repeated in case after case: Black lung causes round scars concentrated in the upper lungs. Latusek had irregularly shaped scars concentrated in his lower lungs, a pattern characteristic of IPF and related diseases. This conclusion absolved Consol of responsibility for his serious lung problems.

Though Latusek continued to work, the amount of oxygen in his blood continued to drop; his lungs couldn't transfer what he breathed in to his bloodstream. He struggled with any exertion and wheezed, especially when he was around dust.

While visiting a mine in Scotland in 1993, he had a moment of panic. He had to crawl 1,000 feet in an opening about four-and-a-half feet high. Halfway across, he lost his breath. "It felt like somebody had put a bag over my face," he recalled. When he got back to West Virginia, he had another episode while walking the steep stairs exiting the mine.

Latusek, in an interview and in court testimony, recalled a conversation with Renn in which the doctor said there wasn't much else he could do and he would likely die in a few years. Renn said privacy rules barred him from discussing Latusek's case, but he added that it is standard practice for him to discuss potential outcomes with patients.

In a legal filing, Consol's lawyer challenged Latusek's recollection, saying there was no mention of a prognosis in Renn's reports.

Not ready to give up, Latusek asked if there was anyone who could help him. Renn referred him to National Jewish Health in Denver, widely regarded as one of the nation's top centers on lung disease. Latusek began flying to see Drs. Constance Jennings and Cecile Rose.

Jennings had studied IPF and similar diseases while at NIH, and, when she first examined Latusek, she wasn't sure that she actually was looking at a case of the disease. It was 1993, and there had been little work on the potential connection to coal dust, but she had her suspicions.

In the report on her initial examination of Latusek in October, she noted that he had evidence of both classic black lung and IPF, then posed the question that would reshape his case: "Are the two processes related?"

"Someone could say peanut butter causes pneumonia," Dr. Gregory Fino said in a February 1997 deposition. "Well, show me in the literature that there is a statistically increased incidence of that occurring, and then I will not prescribe peanut butter to anybody."

Peanut butter was, in his analogy, coal dust, and pneumonia was the pattern of scarring in Latusek's lungs. Fino was adamant that the medical literature showed no connection between the two.

"I can't tell you what caused the idiopathic pulmonary fibrosis," he testified. "I can tell you what hasn't caused it: coal mine dust employment and coal mine dust inhalation."

"We are not informed of any occupational diseases in the mining industry."

RALPH CREWS, COAL INDUSTRY LAWYER, BEFORE A FEDERAL PANEL, 1920

In recent decades, Fino has been perhaps the most high-profile among the cadre of doctors who testify regularly for coal companies. When a miner files a claim, he is entitled to an exam by a doctor from an approved list paid for by the Labor Department, but he also must submit to an exam by a doctor of the company's choosing.

Consol chose Fino to examine Latusek.

Fino was the industry's go-to doctor in the most recent battle over the definition of black lung. When the Labor Department proposed rules in 1997 to expand the list of illnesses potentially caused by breathing coal dust to include such diseases as emphysema and chronic bronchitis, the National Mining Association enlisted Fino.

Along with a biostatistician, he wrote a lengthy critique of the studies relied on by the Labor Department and said, "There is much bad science or loose terminology in these proposed regulations." In 2000, the agency finalized the rules, rebutting Fino's arguments in detail. Fino and other doctors had testified regularly that smoking, not coal dust, caused these diseases that obstructed miners' airways. The approach by Fino and other doctors in Latusek's case was much the same — attack the science linking the disease to coal dust, identify an alternative cause.

Renn, for example, said of black lung and IPF, "There's no literature that relates the two."

Dr. W.K.C. Morgan, a veteran of previous battles over the definition of black lung dating to the 1960s, testified, "I think this is just wishful thinking."

Consol's lawyers hired a statistician to poke holes in the studies introduced into evidence by Latusek's lawyer, Sue Anne Howard.

Unlike many miners, however, Latusek had a tenacious lawyer and doctors with impressive credentials on his side, too.

Howard has represented sick miners since she began practicing law in 1982. The first black lung case she handled was her father's. She won, then watched him "die of black lung by inches," she recalled. As the hours spent on Latusek's case have amassed — time for which she's been barred from collecting any fees — she's tried to support her practice with other cases.

Jennings and Rose from National Jewish had become convinced that Latusek's disease was caused by his job. They acknowledged that the science was still emerging but laid out a rationale for their conclusion. The way his disease struck early, then smoldered for years, was very abnormal for IPF, they said, and a tissue sample showed tiny mineral particles in the area of his scarring. Consol's pathologists disputed this assessment of the biopsy evidence.

In a June 1997 decision, Administrative Law Judge Daniel Leland awarded benefits to Latusek. Consol's lawyers appealed, and, though the Benefits Review Board upheld Leland's decision, the U.S. Court of Appeals for the Fourth Circuit vacated the award in a divided opinion in 1999.

Referencing the studies introduced by Howard, the majority wrote, "At best, the articles offered tepid support for Dr. Jennings's, Dr. Rose's, and the [administrative law judge's] conclusion." The judges noted that Consol had more doctors on its side, and wrote, "Although we do not advocate counting the votes of various medical experts to reach a conclusion ... [w]e believe that such a disparity of opinion merits attention."

The dissenting judge chastised his colleagues for overstepping their authority and substituting their views of the medical evidence for those of the administrative law judge. "All we have here," he wrote, "is a situation where two or three more experts on one side dispute the findings of two or three fewer experts on the opposing side."

A 2002 law review article by Washington and Lee University Professor Brian Murchison singled out the decision as a "particularly disturbing" example of "judicial intrusion."

The ruling sent the case back to the same administrative law judge for reconsideration. The case dragged on, with the judge awarding benefits twice more, before it again arrived at the Fourth Circuit. Again, the majority questioned the medical evidence, this time reversing the award. And again, the dissenting judge — not the same one as in the prior ruling — blasted his colleagues for overreaching. Nonetheless, the 2004 decision ended Latusek's first claim. Latusek was devastated. "My goal in life was to outlive Consol, to live long enough to know that I beat them in this case," he said recently. "I thought that I had. I was on cloud nine. And then it goes to the Fourth Circuit Court, and they take it all away from me."

"It doesn't matter what the damn thing is called. The man can't work, he's disabled."

If Consol's doctors were right, Latusek should have been dead before his case even reached the appeals court. Studies have shown patients with IPF typically die within five years of the onset of the disease. Latusek had first shown signs in 1989. Consol's experts acknowledged this was unusual but said it wasn't unheard of for some people to survive longer.

Ted Latusek on his 40th birthday at the mine office in Fairmont, W.Va., in September 1990. By this time, signs of disease already had appeared — a very early onset if he had the illness that doctors testifying for his employer diagnosed.

Courtesy of Ted Latusek

His age also raised questions. IPF rarely strikes people younger than 50. Latusek was 39 when his disease appeared.

Both of these characteristics — earlier onset and longer survival — were not unique to Latusek, as it turns out. Though this presentation would be abnormal for IPF in the general population, there is evidence that it is not unusual for certain people: miners.

As Latusek's case progressed, scientific interest in IPF grew. "Few lung disorders have seen a renewed investigative focus like IPF," according to a 2003 report prepared by a group of doctors for the American Thoracic Society.

The lungs have a limited number of ways to respond when they come under attack. One response is the pattern of scarring in the lower lungs that often is diagnosed as IPF. But there are many diseases that cause essentially the same pattern and have a defined cause.

Increasingly, research has identified more causes of this pattern. Thus, people with a disease that previously would have been classified as IPF now are diagnosed with a more specific illness.

One prominent cause that has emerged in recent research: occupational dust exposure. Studies have linked the IPF pattern of scarring to breathing fine particles of everything from metal and cotton to coal and silica.

The phenomenon does not appear to be new. A 2012 study by NIOSH epidemiologist Scott Laney and former NIOSH official Lee Petsonk noted that research showing an IPF pattern in miners dated to 1974 but had been largely overlooked. Addressing the often-repeated view about the typical appearance of black lung — one that would exclude an IPF pattern — they wrote, "the scientific foundation for this expectation is unclear."

Analyzing 30 years of X-rays from the agency's surveillance program, roughly half had a discernible pattern affecting only certain areas of the lungs in certain ways, they found. Of these, a striking 30 percent showed a pattern similar to Latusek's.

As researchers have looked more closely, they've seen that evidence of the disease's connection to coal mining — like the disease itself — appears to have been there all along. Studies in the 1970s and 1980s noted the pattern on X-ray and in tissue samples of coal miners. A 1988 study found the pattern on autopsies of between 15 percent and 18 percent of miners in South Wales and West Virginia and noted that the miners' disease had struck earlier and progressed more slowly than IPF.

The most recent edition of a key medical textbook on lung diseases, released in 2005, describes the appearance of the pattern in miners and says, “It is important to be aware of this entity as many cases are inadvertently diagnosed as idiopathic pulmonary fibrosis.”

Earlier this year, a group of doctors described the pattern as a recognized form of black lung in a paper for an American Thoracic Society journal. “The spectrum of lung disease associated with coal mine dust exposure is broader than generally recognized,” the physicians wrote.

Doctors testifying for coal companies counter that this body of research is far from conclusive, saying it fails to show a direct causal relationship. And, they say, the studies failed to control for other potential causes, including smoking, or were skewed because participants were not randomly selected. Some of the same doctors made similar arguments in the 1990s about evidence connecting coal mine dust to diseases such as emphysema and chronic bronchitis.

“There’s no doubt that we need to learn more,” NIOSH’s Weissman said, “but the excess burden that you see in coal miners is much above what you would see in the general population. Even if we don’t know all of the exact details about how coal miners get that, I think it’s pretty clear that it’s associated with the unique exposures that they have.”

Former NIOSH official and current West Virginia University professor Petsonk said the evidence of the connection is becoming overwhelming. “It’s coming to the point where it will just not be controversial,” he said.

“The current norm is the contest of physician’s reports. If this exercise ever had a fresh, truth-seeking outlook, it has long since faded.”

CIRCUIT JUDGE K. K. HALL, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT, DISSENTING OPINION, GRIZZLE V. PICKLANDS MATHER & CO./CHISOLM MINES, 1993

A different story, however, is playing out in the benefits system. Just in cases decided since 2000, miners showing this pattern of disease have lost at least 236 times, a Center review of hundreds of cases found.

The administrative law judges who decide cases can find themselves in a difficult situation when a miner with a disease pattern like Latusek’s files a claim. A miner may not have access to a doctor who can argue persuasively — or who even knows — that the pattern can be caused by coal mine dust. Coal companies, on the other hand, have no shortage of doctors who argue emphatically and in great detail that there is no connection.

In several cases reviewed by the Center, the doctor who examined the miner on behalf of the Labor Department noted the IPF pattern but apparently didn’t consider the possibility it was caused by his work. In other cases, doctors offered equivocal opinions that, while perhaps scientifically responsible, were overwhelmed by the certainty expressed by company doctors.

In a pair of cases, for example, Dr. Donald Rasmussen, who typically testifies for miners, expressed basically the same view: The patient had evidence of an IPF pattern, which has many possible causes but is much more common in coal miners. This, combined with his

breathing impairment and exposure history, made it likely that dust was the cause of his scarring.

One judge considered Rasmussen's opinion "logical" and "well documented" and awarded the miner benefits. The other judge found it "not persuasive" and "not sufficient evidence of causation," denying the miner benefits.

Coal company doctors, on the other hand, often provide categorical statements. In a case decided in 2004, Dr. Lawrence Repsher attacked the miner's doctor, saying, according to the judge's paraphrase, "Dr. James made up a heretofore nonexistent disease that apparently only Dr. James recognizes."

In a case decided in 2007, Dr. George Zaldivar testified, "[Black lung] never has been linked with this kind of impairment and abnormality." Dr. Kirk Hippensteel testified in a case decided in 2008, "It is a disease of the general public that isn't precipitated by some ... exposure to something like coal dust, silica dust."

Each time, the miner lost.

Read such statements by coal company doctors, NIOSH's Weissman responded, "Well, goodness, that would be a surprise to me."

Former administrative law judge Edward Terhune Miller said he handled some cases in which a doctor testifying for the company called the miner's disease IPF.

"I don't like it," he said. "When the doctor says, 'I don't know what it is, but it's definitely not X,' and he's coming from a known direction, I confess I take it with a grain of salt. Now, whether or not in a written decision I can deal with it in some effective way is another question entirely because I'm not allowed to say, 'That's not a reasoned analysis.' "

Indeed, judges are barred from substituting their medical opinions for those of witnesses. They need the miner to present evidence to overcome the company doctors' statements — a steep climb in a system where claimants are typically overmatched.

Before the Labor Department issued regulations in 2000 explicitly stating that diseases such as emphysema and chronic bronchitis can be caused by coal mine dust, company doctors frequently testified that these illnesses were never attributable to work in the mines. Since 2000, most have changed their views. If they stick to their previous dogmatic assertions, a judge can give the opinion no weight. Doctors still can argue that smoking is a more likely cause in a particular case, but they cannot say coal dust is never a possible cause.

Miners' lawyers say this has made it easier to win some cases, and numerous doctors interviewed by the Center said the Labor Department should issue rules to recognize explicitly that an IPF pattern can be caused by coal mine dust.

A Labor Department spokesman said such a regulation would be unnecessary because miners already can try to prove a link between the pattern and their dust exposure. Nonetheless, experts interviewed by the Center argued that formal recognition would set

ground rules and help miners who didn't have access to highly qualified experts who could attempt to draw such a connection.

"The law favors standards," said Howard, Latusek's lawyer. "Right now, with respect to [this form of disease], we have no standards. ... It just becomes, unfortunately, many times a matter of which doctor writes a better report, not which doctor offers the right opinion."

Ted Latusek and his wife, Donna, on their 25th wedding anniversary in July 1996

Courtesy of Ted Latusek

Ted Latusek with his wife, Donna, and daughter, Jennifer, in 2006

Courtesy of Ted Latusek

Ted Latusek shows the scar from his lung transplant in 2006. Courtesy of Ted Latusek
"Experts hired exclusively by either party tend to obfuscate rather than facilitate a true evaluation of a claimant's case."

— *U.S. Court of Appeals for the Sixth Circuit, Woodward v. Director, OWCP, 1993*

Latusek was unconscious for the entirety of his 35th wedding anniversary. He awoke the next day, July 4, 2006, with a tube in his throat. He was confused, panicked. He tried to pull the tube out, but his arms were strapped down.

For two days, machines aided his breathing. When doctors removed the tube, they told him to take a deep breath.

"It was magic," Latusek recalled. "I'd never felt air go in so easy. It was a beautiful feeling. I could actually breathe in deep. For years, I couldn't do that."

He had a new lung, thanks to an organ donor in Connecticut and a team that battled a malfunctioning airplane and torrential storm to get it to him.

The past few days had been frenzied. Latusek and his wife were in Pittsburgh to celebrate their anniversary. They were in bed at a hotel when someone from the hospital called at 12:15 a.m. — a lung had become available.

Throughout the morning and into the next day, nurses and doctors prepared him as they waited for the lung to arrive. At 7:30 p.m., they wheeled him into the operating room.

The lung, however, wasn't there. It was supposed to be coming by plane, but the aircraft's door wouldn't close. It was moved to a helicopter, which was grounded en route by bad weather. An ambulance finally got the lung to Pittsburgh, and doctors worked throughout the night.

Latusek still had one bad lung, but he could breathe on his own again. For about a year, he'd needed an oxygen tank. Tests showed his lung function continued to decline.

His deteriorating health had put his pursuit of benefits on hold. On his behalf, Howard had filed a petition to modify the previous denial in January 2005, but, as his transplant grew imminent, progress had slowed.

As he recovered from the surgery, his case began to inch forward again. This time, Howard was armed with advances in scientific knowledge thanks to renewed interest in IPF.

Jennings had left National Jewish, so Latusek began to see Dr. James Dauber at the University of Pittsburgh Medical Center. He was director of a hospital unit that specialized in treating diseases such as IPF. Yet he, too, became convinced that Latusek's scarring was caused by dust in the mines.

"In the last ten years, our thinking about [IPF and similar diseases] has undergone a tremendous transformation," he testified in 2011. Rose noted in a deposition a few months later, "There's a huge body of science that has emerged since 1995."

Consol had no trouble finding experts who maintained the studies were preliminary and flawed.

Renn again insisted his former patient had a disease of unknown cause. By now, he was doing only consulting work and, according to his testimony five years earlier, charging \$700 an hour. Asked during a deposition if Latusek's scarring was related to breathing coal mine dust, Renn testified, "There is absolutely no scientific literature that would support that statement."

He has given similar opinions in at least 30 cases decided since 2000, a Center analysis found. In an interview, Renn, who is winding down his consulting work and preparing to retire, said he now believes it is possible for coal mine dust to cause a pattern like that seen in IPF. He said he has made such a diagnosis, though he wasn't sure when or how many times. The Center was unable to find any of these diagnoses in court records.

In the past decade, Dr. David Rosenberg has emerged as a primary consultant for coal companies and one of its staunchest debunkers of science related to the connection of coal mine dust and IPF. Rosenberg is an assistant clinical professor at Case Western Reserve University and is affiliated with the University Hospitals system in Cleveland.

In a 2012 deposition, Rosenberg described the volume of his work for coal companies, and conservative estimates of his fees approached \$1 million a year. He testified he didn't know how much he earned from the industry, but that it was "obviously a significant amount."

In Latusek's case, as in others reviewed by the Center, Rosenberg went study by study, critiquing each. One failed to control for smoking, he said. Others weren't designed properly. Overall, the studies raised hypotheses but offered no proof of a causal relationship.

His conclusions went further. "We know that coal mine dust exposure doesn't cause this condition," he testified.

Rosenberg has offered a similar opinion in more than 60 cases decided since 2000, the Center found. In these cases, the miner lost about 60 percent of the time. Rosenberg did not respond to calls and emails requesting an interview.

Fino, who examined Latusek some 15 years earlier, was not involved in his second claim. In a recent interview, he said he didn't recall the case but now believes it is possible that a disease pattern like Latusek's could be caused by coal mine dust.

"I did change my opinion," Fino said. "I go by what the medical literature says."

He said he has made this diagnosis in some cases. The Center's review of hundreds of court decisions did not identify any such cases, but did find about 100 decided since 2000 in which he diagnosed IPF or a similar disease.

In May 2012, Administrative Law Judge Thomas Burke awarded benefits, crediting Latusek's doctors and the studies supporting their claims. This August, however, the Benefits Review Board delivered another setback. It upheld most of Burke's decision but remanded the case, saying he needed to offer a better explanation of why he didn't credit the opinions of two of Consol's doctors.

Ted Latusek with his wife, Donna, and daughter, Jennifer, in 2000 Courtesy of Ted Latusek
"The first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource — the miner."

— *First sentence of the 1969 Federal Coal Mine Health and Safety Act*

Latusek has endured countless complications and indignities during his two-decade fight for benefits. Some drugs made his hair fall out or caused rectal bleeding. Others have caused severe depression and destroyed his kidneys, which will require a transplant in a few years.

A devout Methodist, he sees possible meaning in his suffering. What he can't shake is a deep sense of betrayal.

For Consol, he put in 60- or 70-hour weeks regularly, sometimes more. The team he supervised in the 1980s brought out, on average, about \$70,000 worth of coal per shift, he estimated. He's undergone three knee operations and had two fingers reattached after machinery sliced them almost completely off.

He still has the article from a company publication highlighting a cost-saving discovery he'd made and pictures of him examining machinery for Consol in England or posing with fellow members of a mine rescue team. His email address still begins "Longwall."

"I was loyal to the company," he said, "but the loyalty wasn't there for me."

In 1994, after the company received a letter from Latusek's doctors saying he needed to be moved to an above-ground job because of his health, his managers offered him a personnel job. It would have meant a longer drive and 40-percent pay cut, he recalled.

"I felt like somebody just put a knife in my gut," he said. "I told my wife: 'I can take the lung disease because a lot of that's my problem. I went in that mine and ate that dust and knew better. I should have known better, but I thought I was invincible. But I always thought Consol would take care of me.' "

Now, his case is before an administrative law judge once more, likely to return to the Fourth Circuit court — a trip that could take years.

"If I live long enough to win this case and others that deserve it are awarded benefits because of it," he said, "the suffering I went through would be all for the good."

Black Lung Clinics Call For Action But Top Regulator Plans No New Measures

By Jeff Young

Photo: Adelina Lancianese, NPR

ENERGY & ENVIRONMENTHEALTH

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In the wake of an NPR and PBS *Frontline* investigation into the surge in cases of black lung disease, a coalition of black lung clinics is calling for action to better protect coal miners from dust exposure.

NPR reports that more than 2,300 miners in central Appalachia are sick with the most serious form of the disease. The investigation also documents the inaction by industry and government regulators, despite decades of warnings that tighter controls on coal and rock dust exposure were needed.

The National Coalition of Black Lung and Respiratory Disease Clinics said in a statement Monday that the federal government has “more than enough data demonstrating the risks associated with current mining practices to implement new measures.”

Specifically, the Coalition asks regulators to enact a standard to control the dust generated when mining equipment cuts into rock containing silica, or quartz. Silica dust is highly toxic and, as the NPR investigation shows, health advisors urged tighter control standards on that dust decades ago.

But in a recent call with mining industry stakeholders, the government’s top mine safety and health regulator, David Zatezalo,

said he would have “no announcements” on any new measures to control dust or to address lung disease among miners.

“What we are doing is enforcing the law,” Zatezalo said. Zatezalo is the Assistant Secretary of Labor for Mine Safety and Health and leads the Mine Safety and Health Administration, or MSHA.

Zatezalo, a former mining industry executive, appears to be at odds not only with the black lung clinics but with the findings of the National Academy of Sciences, which last year called for a “fundamental shift” in the way the industry controls dust exposure in order to prevent lung disease among miners.

MSHA Response

In a sometimes testy exchange with reporters, Zatezalo defended MSHA’s current approach to monitoring dust exposure in mines.

“The system has changed and it has increased sampling a lot,” Zatezalo said, referring to changes made during the Obama administration which strengthened standards for dust exposure and introduced new monitoring technology called the continuous personal dust monitor, or CPDM.

“That CPDM has lowered miners’ exposures and we have proof of that,” Zatezalo said. “We sample over twice as much as we used to.”

He said the number of incidents where samples exceed the dust standard is now one-third or one-fifth of what it was before the new monitoring was put in place.

“Quartz exposure has dropped, look at past few years and you will see compliance records have changed dramatically,” Zatezalo said.

He said that due to the latency period between dust exposure and the onset of disease, the current cases of black lung are linked to exposures from when the earlier dust standard was in place.

However, the new devices do not specifically monitor for dust from quartz, or silica. And as the NPR investigation points out, MSHA’s own data show that earlier attempts to use an overall dust standard to control quartz dust exposure resulted in thousands of incidents where miners were exposed to excessive quartz dust.

Hearings Ahead

Zatezalo will likely face tough questions about MSHA’s response to black lung when a Congressional committee takes up the issue.

Shortly after NPR first aired its investigation, Rep. Bobby Scott, the Virginia Democrat who chairs the House Committee on Education and the Workforce, issued a statement.

“I will be calling hearings in the 116th Congress to forge legislative solutions so that we can prevent the physical, emotional, and financial toll of this completely preventable disease,” Scott said.

The mining industry could also face new questions about its compliance with dust monitoring when a trial gets underway in a federal court in Kentucky later this year.

Eight employees of the now-bankrupt Armstrong Energy coal company face federal charges for falsifying dust monitoring samples

in two Kentucky mines. The case renewed suspicions about widespread industry cheating.

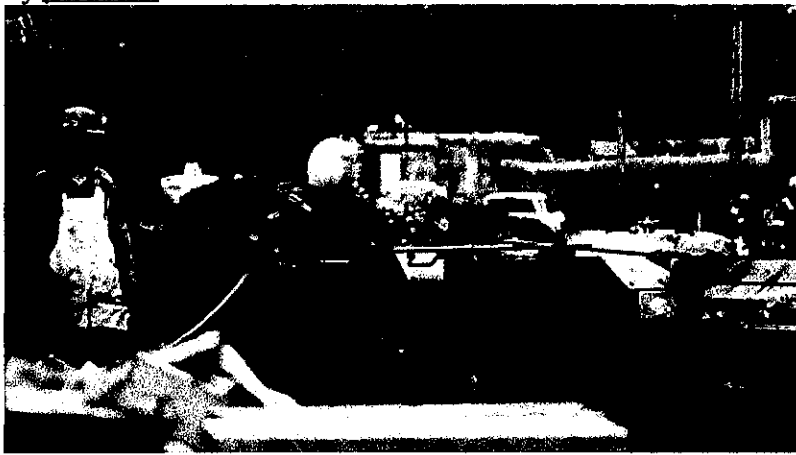
Mine safety expert and Lexington, Kentucky, attorney Tony Oppegard said fraud in dust monitoring undermines MSHA's new dust control measures. "Anyone who thinks that that is going to eliminate black lung is just fooling themselves, as long as cheating goes on."

Celeste Monforton, a former federal mine safety official, echoed that concern.

"It would just be folly to think that cheating is not one of the factors that has contributed to this resurgence of black lung," she said.

Coal lobby fights black-lung tax as disease rates surg

By [Reuters](#)



The Black Lung Disability Trust Fund currently provides medical coverage and monthly payments for living expenses to more than 15,000 people(Reuters)

PRINCETON, West Virginia – As a young man, Barry Shrewsbury dug coal in the West Virginia mines and spent his time off hunting and fishing in the rolling hills. Now, at 62, he struggles to breathe and accomplish basic tasks such as shopping and showering, and relies on a federal fund for ex-miners with black lung disease to pay for an oxygen tank and doctor visits.

“The benefits are a lifeline,” Shrewsbury said between labored breaths after a treatment at the Bluestone Health Center, an industrial-style building set against a leafy landscape in Princeton, West Virginia.

That lifeline is threatened. The Black Lung Disability Trust Fund is at risk of insolvency due to soaring debt and a slashing of coal-company contributions through a tax cut scheduled for the end of the year, according to a report the U.S. Government Accountability Office plans to publish soon, two sources briefed on the study told Reuters.

That shortfall - which comes as black lung rates hit highs not seen in decades - could force the fund to restrict benefits or shift some of the financial burden to taxpayers, the sources said on condition of anonymity. The fund currently provides medical coverage and monthly payments for living expenses to more than 15,000 people, according to a Congressional report published this year.

The coal industry, meanwhile, is lobbying Congress to ensure the scheduled tax reduction goes forward, arguing the payments have already been too high at a difficult time for mining companies and that the fund has been abused by undeserving applicants.

"More often than not, we are being called upon to provide compensation for previous or current smokers," said Bruce Watzman, head of regulatory affairs for the National Mining Association.

He said that view was based on "discussions with those administering this program for companies" and initially said he had no research on black-lung benefits paying for smoking-related diseases.

Watzman later cited a study from 1989 by the University of Louisville School of Medicine. The researchers examined 1,000 black-lung benefit applications and found that coal miners judged "potentially eligible" for benefits smoked at higher rates than those who did not qualify.

Medical experts dispute the association's argument, saying the disease - an incurable illness caused by inhaling coal dust - is easy to distinguish with x-rays.

"It is not caused by smoking," said Dr. David Blackley, head of Respiratory Disease Studies at the National Institute for Occupational Safety and Health.

The Labor Department, which manages the fund, considers all potential causes of an applicant's lung problems before awarding benefits, said Amy Louviere, a spokeswoman for the department's Mine Safety and Health Administration. The approval rate for applications was about 20 percent last year, according to department data.

Coal companies are currently required to pay a \$1.10 per ton excise tax on underground coal production to finance the fund. That amount will revert to the 1977 level of 50 cents at the end of the year if Congress does not extend the current rate.

The fund has already been forced to borrow more than \$6 billion from the U.S. Treasury to finance benefits during the life of the program, according to the Treasury Department. About half of the fund's revenue now goes to servicing that debt.

A bipartisan effort by lawmakers to extend the current coal tax failed this year after the mining association lobbied Republican House leadership not to take it up. Watzman said he was "not at liberty" to identify members of Congress who oppose extending the tax.

Matt Sparks, a spokesman for House Majority Leader Kevin McCarthy's office, did not respond to requests for comment.

Lawmakers expect discussion of the tax to resume after the GAO report is released.

“We need to take care of the miners,” said Virginia Republican Congressman Morgan Griffith, who represents a district that has seen one of the biggest surges in the disease. “We first need to have all facts on the table.”

The mining association and large miners such as Peabody Energy, Arch Coal, and Consol Energy are already pressing their case, according to Congressional lobbying records that show the black lung fund among the subjects discussed in their recent meetings with lawmakers.

Peabody spokeswoman Michelle Constantine declined to comment. Arch spokesman Logan Bonacorsi and Consol spokesman Zachary Smith did not respond to requests for comment.

The upcoming GAO report was requested in 2016 by Democratic Congressmen Bobby Scott of Virginia and Sander Levin of Michigan and has undergone review by the administration of President Donald Trump, who has focused on slashing regulation to help the coal industry.

White House spokeswoman Kelly Love did not respond to a request for comment on the administration’s position on the excise tax.

BLACK LUNG RESURGENCE

The fund pays benefits to miners severely disabled by black lung in cases where no coal company can be found to directly provide support. That typically occurs when a company has gone belly-up – an increasingly common scenario as the nation’s utilities shift to cheaper natural gas and cleaner solar and wind power.

Some 2,600 medical claims were transferred from companies to the fund in 2017 due to bankruptcies, according to a Congressional report this year.

Government research shows the incidence of black lung rebounding, despite improved safety measures adopted decades ago - such as dust screens and ventilation - that had nearly eradicated the disease in the 1990s.

In February, the National Institute for Occupational Safety and Health confirmed 416 cases of advanced black lung disease in three medical clinics in rural Virginia from 2013 to 2017 - the highest concentration of cases ever seen. It also confirmed a 2016-2017 investigation by National Public Radio that found many hundreds more cases in southwestern Virginia, southern West Virginia and eastern Kentucky.

"This is history moving in the wrong direction," said Kirsten Almberg, an assistant professor of environmental and occupational health at the University of Illinois at Chicago.

Almberg authored an analysis of Labor Department data showing that nearly half the 4,679 benefits claims from miners with the worst form of black lung disease were made since 2000.

Ex-miners and regional health experts blame the resurgence on longer hours spent in deeper parts of old, played-out mines, along with lax safety measures and the use of heavy machines to blast through layers of rock.

"We didn't use curtains. We rarely used ventilators. We thought we were invincible," said Greg Jones, who left mining in March and now coordinates benefits applications at the Tug River Black Lung Clinic in Gary, West Virginia.

Brandon Crum, a radiologist at the United Medical Group in Pikeville, Kentucky, said he has personally diagnosed more than 150 cases of advanced black lung disease since 2016, many in younger miners.

Crum, whose own family worked the mines for a century, said many of these people face a lifetime unable to work, inundated with medical bills.

“Any kind of asset or financial stability you would take away from these miners and their families would be devastating,” he said.

“APPLICATION REJECTED”

To qualify for benefits, a miner must apply to the Department of Labor, which screens the applications based on medical and employment documentation and then tries to find a responsible coal company to pay the costs.

Jim Werth, the black lung clinic director at Stone Mountain Health Services in St. Charles, Virginia, said his clinic has three people on staff helping patients file for benefits. He rejected the idea that the fund was covering undeserving applicants, saying the process already makes it hard to qualify, with coal companies often hiring doctors to dispute medical test results.

William McCool, 64, said it took him years to win benefits.

“I worked 40 years in the mines, and the benefits don’t come automatic,” said McCool, who wore a gray baseball cap emblazoned with a crossing pick-axe and shovel during an interview at the Mountain Health Center in Whitesburg, Kentucky, where he receives oxygen and physical therapy.

Kennith Adams - a 62-year-old former miner who survived stage-four colon cancer and is now suffering advanced black lung - had his first application

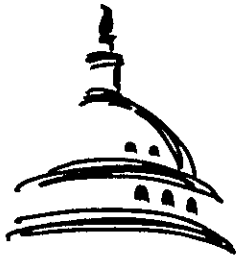
rejected two years ago, he said. Consol argued he did not work for the firm when he became ill. Adams had worked at the Bishop Coal Company, which later got taken over by Consol.

Consol did not respond to a request for comment.

Adams and his wife Tammie are now hoping his latest application - sent last month - will be approved to help them pay medical bills of more than \$12,000 a month.

"If he doesn't get his medicine," his wife said, "he doesn't stand a chance."

Attachment
39



**Congressional
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The Black Lung Program, the Black Lung Disability Trust Fund, and the Excise Tax on Coal: Background and Policy Options

Updated January 18, 2019

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The Black Lung Program, the Black Lung Disability Trust Fund, and the Excise Tax on Coal: Background and Policy Options

R45261

January 18, 2019

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The federal government pays benefits to coal miners affected by coal workers' pneumoconiosis (CWP, commonly referred to as black lung disease) and other lung diseases linked to coal mining in cases where responsible mine operators are not able to pay. In 2019, the monthly benefit for a miner with no dependents is \$660.10. Benefits can be as much as \$1,320.10 per month for miners with three or more dependents. Medical benefits are provided separately from disability benefits. Benefit payments and related administrative expenses in cases in which the responsible operators do not pay are paid out of the Black Lung Disability Trust Fund. The primary source of revenue for the trust fund is an excise tax on coal produced and sold domestically. If excise tax revenue is not sufficient to finance Black Lung Program benefits, the trust fund may borrow from the general fund of the Treasury.

For 2018, the tax rates on coal were \$1.10 per ton of underground-mined coal or \$0.55 per ton of surface-mined coal, limited to 4.4% of the sales price. These rates were established in 1986. Starting in 2019, under current law, these tax rates are \$0.50 per ton of underground-mined coal or \$0.25 per ton of surface-mined coal, limited to 2% of the sales price. These are the rates that were set when the trust fund was established in 1977.

The decline in the excise tax rates will likely put additional financial strain on a trust fund that already borrows from the general fund to meet obligations. The decline in domestic coal production, recent increases in the rate of CWP, and bankruptcies in the coal sector also contribute to the financial strain on the trust fund.

The Black Lung Disability Trust Fund and associated excise tax on coal were established so that the coal industry, as opposed to taxpayers in general, would bear the burden associated with providing black lung benefits. Throughout its history, the Black Lung Disability Trust Fund has not raised revenues sufficient to meet obligations. As a result, at various points in time, Congress and the President have acted to increase the excise tax on coal, forgive or refinance trust fund debt, and modify black lung benefits eligibility. With the rate of the excise tax on coal reduced in 2019, the 116th Congress may again evaluate options for improving the fiscal condition of the Black Lung Disability Trust Fund, or other issues related to providing federal benefits to miners with black lung disease.

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The federal government pays benefits to coal miners affected by coal workers' pneumoconiosis (CWP, commonly referred to as black lung disease) and other lung diseases linked to coal mining in cases where the responsible mine operators are not able to pay. Benefit payments and related administrative expenses are paid out of the Black Lung Disability Trust Fund. The primary source of revenue for the trust fund is an excise tax on coal produced and sold domestically. If excise tax revenue is not sufficient to finance Black Lung Program benefits, the trust fund may borrow from the general fund of the Treasury, which contains federal receipts not earmarked for a specific purpose.

For 2018, the tax rates on coal were \$1.10 per ton of underground-mined coal or \$0.55 per ton of surface-mined coal, limited to 4.4% of the sales price. Starting in 2019, under current law, these tax rates are \$0.50 per ton of underground-mined coal or \$0.25 per ton of surface-mined coal, limited to 2% of the sales price. This decline in the excise tax rates will likely put additional financial strain on a trust fund that already borrows from the general fund to meet obligations. The decline in domestic coal production, recent increases in the rate of CWP, and bankruptcies in the coal sector also contribute to the financial strain on the trust fund.¹

This report provides background information and policy options to help inform the debate surrounding the coal excise tax rate, and other considerations related to the Black Lung Disability Trust Fund. The report begins with an overview of the federal black lung program, providing information on black lung disease and benefits under the program. The report proceeds to examine Black Lung Disability Trust Fund revenues, focusing on the coal excise tax and its history. The report closes with a discussion of policy options, evaluating various revenue- and benefits-related policy options that could improve the fiscal outlook of the Black Lung Disability Trust Fund.

Federal Black Lung Program

The Black Lung Disability Trust Fund is used to finance the payment of federal Black Lung Program benefits under Part C of the Black Lung Benefits Act (BLBA) when a responsible coal operator does not meet its obligations under the law to pay benefits.

Black Lung Disease

Coal workers' pneumoconiosis (CWP, commonly referred to as black lung disease) is an interstitial lung disease caused by the inhalation of coal dust.² Like in other types of pneumoconioses, the inhalation of coal dust results in the scarring of the lung tissue and affects the gas-exchanging ability of the lungs to remove carbon dioxide and take oxygen into the bloodstream.³ Exposure to coal dust over an extended period of time can lead to CWP and continued exposure can lead to the progression from the early stages of CWP referred to as "simple CWP," to more advanced stages of scarring referred to as "complicated CWP" or progressive massive fibrosis (PMF). There is no cure for CWP and PMF. CWP can lead to loss of

¹ For general information on the U.S. coal industry, see CRS Report R44922, *The U.S. Coal Industry: Historical Trends and Recent Developments*, by Marc Humphries.

² For additional information on CWP, see the website of the National Institute for Occupational Safety and Health (NIOSH) at <https://www.cdc.gov/niosh/topics/cwhsp/coalminingrelatedrespiratorydiseases.html>.

³ Other types of pneumoconioses include silicosis caused by the inhalation of silica dust, and asbestosis caused by the inhalation of asbestos fibers. For additional information on pneumoconioses, see the website of NIOSH at <https://www.cdc.gov/niosh/topics/pneumoconioses/>.

lung function, the need for lung transplantation, and premature death. CWP can be identified by observing light spots, or opacities, in x-ray images of the lungs and can be classified using guidelines established by the International Labour Organization (ILO).⁴

Despite technological advances in mining dust control, mandatory chest x-rays for miners,⁵ free CWP surveillance offered to miners by the National Institute for Occupational Safety and Health (NIOSH),⁶ the enactment of numerous pieces of mine safety and health legislation,⁷ and the promulgation and enforcement of mine safety and health standards by the Mine Safety and Health Administration (MSHA),⁸ CWP persists in American coal miners, especially those in the Appalachian region. After reductions in rates of PMF in the 1990s, this advanced form of CWP has recently been found in Central Appalachia at rates not seen since the early 1970s.⁹ In 2017 researchers discovered, among coal miners mostly living in Kentucky and Virginia and served by three federally funded Black Lung Clinics in Virginia,¹⁰ what may be the largest cluster of PMF ever recorded.¹¹

This cluster of miners with PMF includes a relatively high number of miners with less than 20 years of mining experience as well as cases of PMF in current miners. The occurrence of this advanced stage of CWP in short-tenured and current miners is noteworthy since MSHA standards require that any miner with evidence of CWP be given the option, without loss of compensation or other penalty, to work in an area of the mining operation in which the average concentration of coal dust in the air is continuously maintained at or below an established level that is lower than the permissible exposure level for all miners with the goal of preventing the progression of CWP.¹²

⁴ For additional information on the ILO classification system, see the website of NIOSH at <https://www.cdc.gov/niosh/topics/chestradiography/ilo.html>.

⁵ Federal law at 30 U.S.C. § 843(a) requires that each miner new to coal mining be given a free chest x-ray within 18 months of starting work, a follow-up x-ray within three years of the first x-ray, and if the follow-up x-ray shows evidence of CWP, an additional chest x-ray within two years of the follow-up x-ray.

⁶ For additional information on the NIOSH Coal Workers' Health Surveillance Program, see the NIOSH website at <https://www.cdc.gov/niosh/topics/cwhsp/default.html>.

⁷ The major pieces of enacted coal mine safety and health legislation are the Federal Coal Mine Safety and Health Act of 1969 (P.L. 91-73), the Federal Mine Safety and Health Amendments Act of 1977 (P.L. 95-164), and the Mine Improvement and New Emergency Response Act of 2006 (MINER Act, P.L. 109-236).

⁸ The MSHA standards for underground coal mine safety and health are published in Chapter 1, Subchapter O, of Part 30 of the C.F.R. In 2015, MSHA revised its standards on exposure to respirable coal dust to lower exposure limits for coal miners (Mine Safety and Health Administration, "Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors," 79 *Federal Register* 24813, May 1, 2014).

⁹ David J. Blackley, Cara N. Halldin, and A. Scott Laney, "Resurgence of a Debilitating and Entirely Preventable Respiratory Disease among Working Coal Miners," *American Journal of Respiratory and Critical Care Medicine*, vol. 190, no. 6 (September 15, 2014), pp. 708-709; and David J. Blackley, James B. Crum, Cara N. Halldin, et al., "Resurgence of Progressive Massive Fibrosis in Coal Miners-Eastern Kentucky, 2016," *Morbidity and Mortality Weekly Report*, vol. 65, no. 49 (December 16, 2016), pp. 1385-1389.

¹⁰ Federal Black Lung Clinics are medical clinics that provide screening and treatment for CWP regardless of a miner's ability to pay. Federal Black Lung Clinics are supported by grants from the Department of Health and Human Services (HHS), Health Resources and Services Administration (HRSA) as authorized by 30 U.S.C. §937.

¹¹ David J. Blackley, Laura E. Reynolds, Connie Short, et al., "Progressive Massive Fibrosis in Coal Miners from Three Clinics in Virginia," *Journal of the American Medical Association*, vol. 319, no. 5 (February 6, 2018), pp. 500-501.

¹² 30 C.F.R. §90.3. The concentration limits of respirable coal dust are 1.5 milligrams per cubic meter (mg/m³) of air for all miners and 0.5 mg/m³ for miners with evidence of CWP.

Federal Black Lung Program

The federal Black Lung Program was created in 1969 with the enactment of Title IV of the Federal Coal Mine Health and Safety Act of 1969 (Coal Act, P.L. 91-173, later renamed the Federal Mine Safety and Health Act of 1977 by P.L. 95-164). Section 401 of the Coal Act provides the congressional justification for the federal Black Lung Program and cites the lack of benefits for disability and death caused by CWP provided by existing state workers' compensation systems as justification for the creation of a federal program. This section also states that the program is intended to be a cooperative effort between the federal government and the states.

The Coal Act also established mandatory safety and health standards for coal mines, including standards limiting exposure of miners to coal dust and giving miners with CWP the option of being moved, without loss of compensation or penalty, to an area of the mine with lower dust concentrations. The Coal Act was later amended by the Black Lung Benefits Act of 1972 (BLBA, P.L. 92-303).

Part B

The Coal Act established Part B of the federal Black Lung Program to provide cash benefits to miners totally disabled due to CWP and to the survivors of miners who die from CWP.¹³ Part B only applies to cases filed on or before December 31, 1972. Part B benefits are paid out of general revenue and were initially administered by the Social Security Administration (SSA). Today, with the exception of a small number of pending appellate cases, Part B benefits are administered by the Department of Labor (DOL), Office of Workers' Compensation Programs (OWCP).

Part C

The Coal Act established Part C of the Federal Black Lung Program for cases filed after December 31, 1972, and was later amended by the BLBA. Under Part C of the BLBA, all claims for benefits for disability or death due to CWP are to be filed with each state's workers' compensation system, but only if such systems have been determined by DOL as providing benefits that are equivalent to or greater than the cash benefits provided by the federal government under Part B of the BLBA and the medical benefits provided to disabled longshore and harbor workers under the federal Longshore and Harbor Workers' Compensation Act (LHWCA).¹⁴ If a state's workers' compensation system is not determined by DOL to meet these standards, then Part C benefits are to be paid by the each miner's coal employer, or, if no such employer is available to pay benefits, by the federal government.

In 1973, Maryland, Kentucky, Virginia, and West Virginia submitted their state workers' compensation laws to DOL for approval, but were denied.¹⁵ To date, no state workers' compensation system has been approved by DOL under Part C of the BLBA.

¹³ Although Part B did not originally include medical benefits, these benefits are now available to Part B claimants under Part C and are paid by the responsible mine operators or the Black Lung Disability Trust Fund.

¹⁴ For additional information on the LHWCA, see CRS Report R41506, *The Longshore and Harbor Workers' Compensation Act (LHWCA): Overview of Workers' Compensation for Certain Private-Sector Maritime Workers*, by Scott D. Szymendera.

¹⁵ Peter S. Barth, *The Tragedy of Black Lung: Federal Compensation for Occupational Disease* (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 1987), p. 196.

Operator Responsibility

Because no state's workers' compensation system has been determined to be sufficient to pay benefits under Part C, each operator of an underground coal mine is responsible for the payment of benefits to that operator's miners. Operators are required to provide for these benefits either by purchasing insurance for benefits or through self-insurance approved by DOL.

A self-insured operator is required to purchase an indemnity bond or provide another form of security (such as a deposit of negotiable securities in a Federal Reserve Bank or the establishment of a trust) in an amount specified by DOL. In order to be approved for self-insurance, federal regulations require that a mine operator have been in business for at least the three previous years and have average assets over the previous three years that exceed current liabilities by the sum of expected benefit payments and annual premiums on the indemnity bond.¹⁶

When a claim for benefits is approved, benefits are to be paid by the "responsible" operator, which is generally the last coal operator to employ the miner.¹⁷ If a company has acquired the assets of a mine operator, then that company is considered a "successor operator" and is responsible for the payment of claims related to the original operator.¹⁸

Federal Payment of Benefits and Expenses

The federal government pays benefits in cases in which the responsible operator no longer exists and has no successor operator, or is unable to pay benefits. The federal government pays benefits when an operator has not made payment within 30 days of a determination of eligibility or when benefits are otherwise due to be paid. Initially, under Part C of the Coal Act, these federal benefits were paid out of general revenue. However, pursuant to the Black Lung Benefits Revenue Act of 1977 (P.L. 95-227), these benefits are now paid from the Black Lung Disability Trust Fund established by this law and primarily financed by an excise tax on coal. If a responsible operator can later be identified, the trust fund is authorized by law to seek to recover from this operator the amount of benefits paid by the trust fund and any interest earned on these amounts.

The trust fund is also used for the following federal Black Lung Program-related expenses:

- the payment of benefits for miners whose last coal mine employment was before January 1, 1970;
- reimbursement to the Treasury for the costs of Part C benefits paid from general revenue before April 1, 1978, for periods of benefit eligibility after January 1, 1974;
- the repayment and payment of interest on advances made from the general fund to the trust fund;
- the payment of administrative expenses related to Part C of the BLBA and the coal excise tax incurred after March 1, 1978; and
- the reimbursement of coal operators who paid Part C benefits before April 1, 1978, for miners whose last coal mine employment ended before January 1, 1970.¹⁹

¹⁶ 20 C.F.R. §726.101.

¹⁷ 20 C.F.R. §725.495.

¹⁸ 20 C.F.R. §725.492.

¹⁹ 26 U.S.C. §9501(d).

Eligibility for Black Lung Benefits

A miner is eligible for benefits if that miner is totally disabled due to pneumoconiosis arising out of coal mine employment. The survivors of a miner are eligible for benefits if the miner's death was due to pneumoconiosis arising out of coal mine employment.

Benefits are only available to miners and their survivors. The BLBA defines a miner as

any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.²⁰

Thus, other workers who may be exposed to coal dust in their work, such as railroad workers or workers at coal-fired power plants are not eligible for benefits. Persons who live near coal mines or power plants are also not eligible for benefits even if they are exposed to coal dust. In addition, while a miner's family members may receive benefits as survivors and the number of family members can increase the amount of a miner's monthly benefits, family members may not claim benefits on their own due to exposure to coal dust in the home such as from cleaning the miner's soiled clothing.

The BLBA defines pneumoconiosis for the purposes of benefit eligibility as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."²¹ The BLBA directs the Secretary of Labor to develop, through regulations, standards for determining if a miner is totally disabled due to pneumoconiosis or died due to pneumoconiosis.²²

Clinical and Legal Pneumoconiosis

The federal Black Lung Program regulations provide that the definition of pneumoconiosis includes medical or "clinical" pneumoconiosis and statutory or "legal" pneumoconiosis. Clinical pneumoconiosis is defined as follows:

"Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.²³

Legal pneumoconiosis is defined as

any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.²⁴

²⁰ 30 U.S.C. §902(d).

²¹ 30 U.S.C. §902(b).

²² 30 U.S.C. §921(b). These regulations are at 20 C.F.R. §§ 718.201-718.206.

²³ 20 C.F.R. §718.201(a)(1).

²⁴ 20 C.F.R. §718.201(a)(2).

Through these definitions, DOL has established that benefits are available not just to miners with CWP, but also to those miners with other respiratory diseases arising out of coal mine employment such as chronic obstructive pulmonary disease (COPD) even though these diseases are not pneumoconioses and may be linked to other factors unrelated to exposure to coal dust such as cigarette smoking.²⁵

Eligibility Presumptions

The BLBA contains five presumptions used to determine if a miner is eligible for black lung benefits.²⁶ Three of these presumptions are “rebuttable,” meaning that, in the absence of any contrary evidence, eligibility is presumed. One presumption is “irrebuttable” and eligibility for Black Lung program benefits is established if the statutory requirements of the presumption are met. Three of these presumptions apply to current Black Lung Program claims while two apply only to cases filed before the end of 1981. **Table 1** provides a summary of the following five presumptions provided by the BLBA.²⁷

1. A rebuttable presumption that the pneumoconiosis of a miner who was employed in mining for at least 10 years was caused by his or her employment.
2. A rebuttable presumption that the death of a miner who worked in mining for at least 10 years and who died of any respirable disease, was due to pneumoconiosis. This presumption does not apply to claims filed on or after January 1, 1982, the effective date of the Black Lung Benefits Amendments of 1981 (P.L. 97-119).
3. An irrebuttable presumption that a miner with any chronic lung disease which meets certain statutory tests or diagnoses is totally disabled due to pneumoconiosis or died due to pneumoconiosis.
4. A rebuttable presumption that a miner employed in mining for at least 15 years, and who has a chest x-ray that is interpreted as negative with respect to certain statutory standards but who has other evidence of a totally disabling respiratory or pulmonary impairment, is totally disabled due to pneumoconiosis or died due to pneumoconiosis. This presumption may only be rebutted by the Secretary of Labor establishing that the miner does not or did not have pneumoconiosis or that the miner’s respiratory or pulmonary impairment did not arise out of connection to mine employment.
5. A presumption that a miner who died on or before March 1, 1978, and who was employed in mining for at least 25 years before June 30, 1971, died due to pneumoconiosis, unless it is established that at the time of the miner’s death, he or she was not at least partially disabled due to pneumoconiosis. This presumption does not apply to claims filed on or after June 29, 1982, which is

²⁵ For example, deaths due to COPD are strongly linked to cigarette smoking. The Centers for Disease Control and Prevention (CDC) estimated an average of 114,462 annual deaths due to COPD in the form of bronchitis, emphysema, and chronic airway obstruction during the period between 1997 and 2001 in the United States. Of these deaths, 79.1% were attributable to cigarette smoking (Centers for Disease Control and Prevention, “Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses-United States, 1997-2001,” *Morbidity and Mortality Weekly Report*, vol. 54, no. 25 (July 1, 2005), pp. 625-628).

²⁶ 30 U.S.C. §921(c).

²⁷ The presumption number corresponds to the paragraph number in Subsection (c) of Section 411 of the Black Lung Benefits Act [30 U.S.C. §921(c)].

180 days after the effective date of the Black Lung Benefits Amendments of 1981. This presumption is not listed in the law as either rebuttable or irrebuttable.

Affordable Care Act Amendments

The Patient Protection and Affordable Care Act (commonly referred to as the Affordable Care Act (ACA), P.L. 111-148) included two provisions that amended the BLBA to reinstate one of the eligibility presumptions and a provision affecting survivors' benefits. The effect of these changes was to increase the opportunity to establish eligibility through the statutory presumptions and make it easier for certain survivors to receive benefits.

Pursuant to Section 202(a) of the Black Lung Benefits Amendments of 1981, the fourth presumption did not apply to cases filed on or after January 1, 1982. Section 1556(a) of the ACA removed the prohibition on applying the fourth presumption to cases filed on or after January 1, 1982. It is expected that this ACA provision will increase the number of miners eligible for benefits.

The BLBA provides that, for Part C claims, the survivors of a miner who was determined to be eligible to receive benefits at the time of his or her death are not required to file new claims for benefits or revalidate any claim for benefits, thus permitting the payment of survivors' benefits in these cases even if the miner's death was not caused by pneumoconiosis.²⁸ Pursuant to Section 203(a)(6) of the Black Lung Benefits Amendments of 1981, this provision did not apply to claims filed on or after January 1, 1982. Section 1556(b) of the ACA removed from this provision the exception for claims filed on or after January 1, 1982. It is expected that this ACA provision will increase the number of survivors eligible for benefits.

The amendments to the BLBA provided in Section 1556 of the ACA apply to any claims filed under Part B or C of the act after January 1, 2005, that were pending on or after March 23, 2010, the date of enactment of the ACA.

²⁸ 30 U.S.C. §932(l).

Table 1. Eligibility Presumptions Provided in the BLBA, as Amended by Section 1556 of the Affordable Care Act (ACA)

Presumption Number ^a	Type of Presumption	Minimum Number of Years of Mine Employment	Basic Presumption	Exception
1	Rebuttable	10	If a miner has pneumoconiosis, then pneumoconiosis was caused by employment	None
2	Rebuttable	10	If death was from respirable disease, then death was due to pneumoconiosis	Does not apply to claims filed on or after January 1, 1982
3	Irrebuttable	None	If a miner has chronic dust disease of the lung which meets statutory standards, then he or she is totally disabled due to pneumoconiosis or died due to pneumoconiosis	None
4	Rebuttable	15	If a miner has negative chest roentgenogram, but has other evidence of respiratory or pulmonary impairment, then he or she is totally disabled due to pneumoconiosis or died due to pneumoconiosis	None ^b
5	—	25, before June 30, 1971	If a miner died before March 1, 1978, then miner died due to pneumoconiosis, unless it is established that the miner did not have at least a partial disability due to pneumoconiosis at the time of death	Does not apply to claims filed on or after June 29, 1982

Source: Congressional Research Service (CRS).

- The presumption number corresponds to the paragraph number in Subsection (c) of Section 411 of the Black Lung Benefits Act [30 U.S.C. §921(c)] and listed in this report.
- Prior to the enactment of the ACA, this presumption did not apply to claims filed on or after January 1, 1982.
- This presumption is not listed in the law as either rebuttable or irrebuttable.

Black Lung Program Benefits

Medical Benefits

Eligible miners receiving benefits under Parts B and C are entitled to medical coverage for their pneumoconiosis and related disability. This medical coverage is provided at no cost to the miner and can generally be obtained from the miner's choice of medical providers.

Disability Benefits

Eligible miners are also entitled to cash disability benefits. The basic benefit rate is set at 37.5% of the basic pay rate at GS-2, Step 1, on the federal pay schedule without any locality

adjustment.²⁹ If the miner has one dependent (a spouse or minor child) the miner is eligible for a benefit of 150% of the basic benefit. A miner with two dependents is eligible for 175% of the basic benefit and a miner with three or more dependents is eligible for 200% of the basic benefit. Benefits may also be paid to the divorced spouse of a miner if the marriage lasted at least 10 years and the divorced spouse was dependent on the miner for at least half of the spouse's support at the time of the miner's disability. A child is considered a dependent until the child marries, or reaches age 18, unless the child is either disabled using the Social Security Disability Insurance (SSDI) definition of disability or is under the age of 23 and a full-time student.³⁰ The benefit rates are adjusted whenever there are changes to the federal employee pay schedules, but are not separately adjusted to reflect changes in the cost of living. **Table 2** provides the benefit rates for 2019. Benefits are offset by state workers' compensation or other benefits paid on account of the miner's disability or death due to pneumoconiosis. Part C benefits, but not Part B benefits, are considered workers' compensation for the purposes of reducing a miner's SSDI benefits.³¹

Table 2. Monthly Black Lung Benefit Amounts for CY2019

Category	Monthly Benefit Amount
Claimant with no dependents	\$660.10
Claimant with one dependent	\$990.10
Claimant with two dependents	\$1,155.10
Claimant with three or more dependents	\$1,320.10

Source: Office of Worker's Compensation Programs (OWCP) website at <https://www.dol.gov/owcp/dcmwc/regs/compliance/blbene.htm>.

Notes: Benefits listed are for Part C claims, which are rounded up to the nearest 10 cents. Benefits for Part B claims are the same amount as for Part C, but rounded to the nearest dollar.

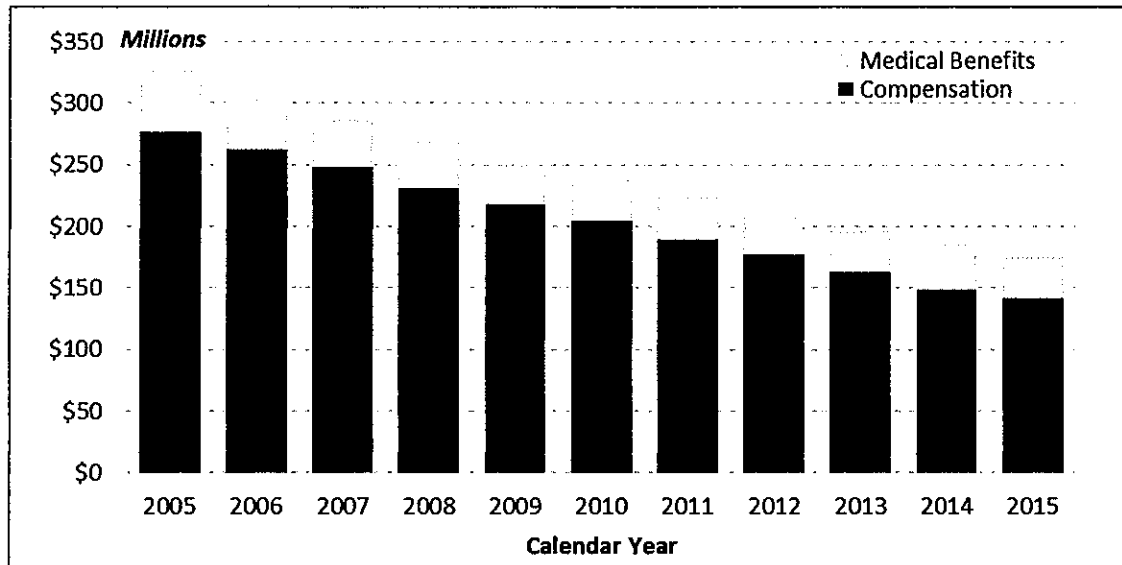
The total amount paid in cash disability benefits has fallen over time, as illustrated in **Figure 1**. More is paid in cash disability benefits than is paid in medical benefits.

²⁹ The 2018 General Schedule (Base) pay rates are available on the website of the Office of Personnel Management (OPM) at <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2018/general-schedule/>. As there has been no legislation or presidential action to increase federal pay rates, the 2018 rates will continue in 2019.

³⁰ The SSDI definition of disability is provided at 42 U.S.C. §423 and generally requires that a person be unable to work full-time because of a disability. For additional information on SSDI and the definition of disability, see CRS In Focus IF10506, *Social Security Disability Insurance (SSDI)*, by William R. Morton.

³¹ Section 224 of the Social Security Act (42 U.S.C. §424) provides that in cases in which a person receives both SSDI and workers' compensation benefits in a given month, the amount of the monthly SSDI benefit or the workers' compensation benefit is reduced, but not below zero, until the combined amount of the benefits equals 80% of the person's pre-disability wage depending on the type of workers' compensation benefit. In the case of Part C benefits, the person's SSDI benefit is reduced.

Figure 1. Black Lung Part C Benefit Costs
CY2005-CY2015

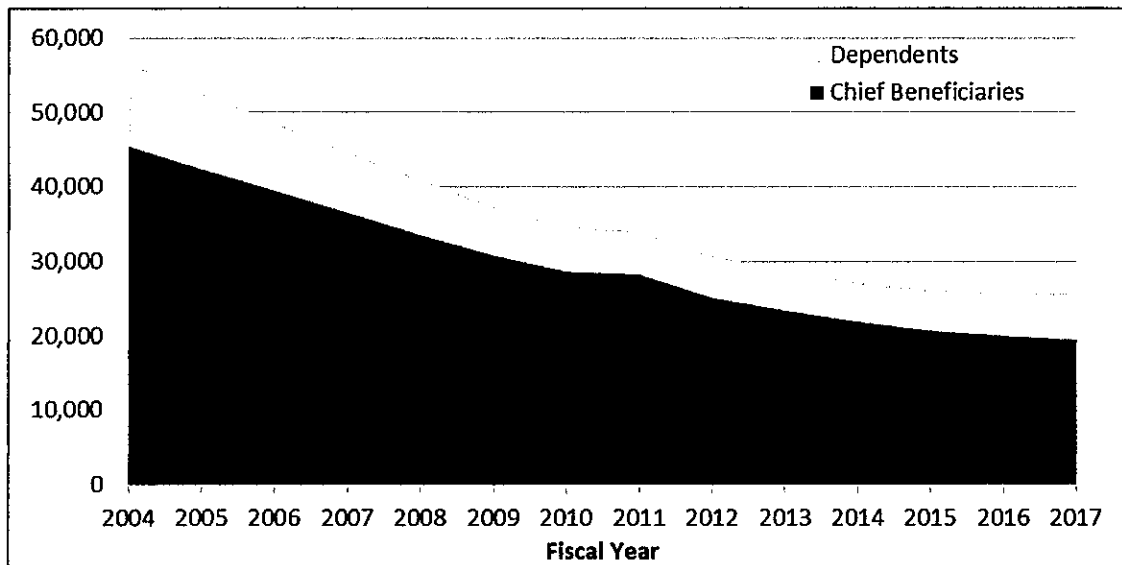


Source: Christopher F. McLaren and Marjorie L. Baldwin, *Workers' Compensation: Benefits, Coverage, and Costs, (2015 Data)*, National Academy of Social Insurance, October 2017, p. 70, <https://www.nasi.org/research/2017/report-workers%E2%80%99-compensation-benefits-coverage-costs-%E2%80%93-2015>.

Survivors' Benefits

Certain survivors of a miner whose death was due to pneumoconiosis are eligible for cash benefits. In the case of a surviving spouse or divorced spouse, the spouse's benefit is equal to what the miner would have received and is based on the number of dependents of the spouse as provided in **Table 2**. If there is no surviving spouse, then benefits are awarded to the surviving minor children in equal shares. If there are no surviving minor children, then benefits can be paid to the miner's dependent parents or dependent siblings. If there are no eligible survivors, no benefits are paid upon the miner's death and benefits do not go to the miner's estate or to any other person, including a person named by the miner in a will. The number of miners and survivors receiving benefits has declined over time, as illustrated in **Figure 2**.

Figure 2. Black Lung Part C Beneficiaries
FY2004-FY2017



Source: Office of Workers' Compensation Programs (OWCP) website at <https://www.dol.gov/owcp/dcmwc/statistics/PartsBandCBeneficiaries.htm>.

Notes: Chief Beneficiary is either the miner or the miner's primary survivor.

Black Lung Disability Trust Fund Revenues

The primary revenue source for the Black Lung Disability Trust Fund is a per-ton excise tax on coal. Historically, the coal excise tax has not generated enough revenue to meet the trust fund's obligations. Thus, additional funds have been provided from the general fund of the Treasury.³² The general fund includes governmental receipts not earmarked for a specific purpose, the proceeds of general borrowing, and is used for general governmental expenditures.

Excise Tax on Coal

Internal Revenue Code (IRC) Section 4121 imposes the black lung excise tax (BLET) on sales or use of domestically mined coal.³³ Generally, a producer that sells the coal is liable for the tax. Producers that use their own domestically mined coal, such as integrated utilities or steel companies, are also liable for the tax.

The tax rate depends on how coal is mined. Effective January 1, 2019, the tax on underground-mined coal is the lesser of (1) \$0.50 per ton, or (2) 2% of the sale price. The tax on surface-mined coal is the lesser of (1) \$0.25 per ton, or (2) 2% of the sales price. Before 2019, the tax rates were \$1.10 per ton for coal from underground mines or \$0.55 per ton for coal from surface mines, with the tax being no more than 4.4% of the sale price. In FY2017, \$229 million was collected on coal mined underground (see **Figure 3**). Nearly all of this coal was taxed at the \$1.10 per ton rate. In

³² Certain excise taxes related to Black Lung Benefit Trusts are also deposited in the Black Lung Disability Trust Fund. Generally, since very little or no amounts have been reported for these excise taxes, a discussion of these taxes has not been included in this report. Black Lung Benefit Trusts are tax-exempt trusts, as described in Internal Revenue Code (IRC) Section 501(c)(21). There are no active 501(c)(21) organizations at this time.

³³ The tax does not apply to lignite (brown coal).

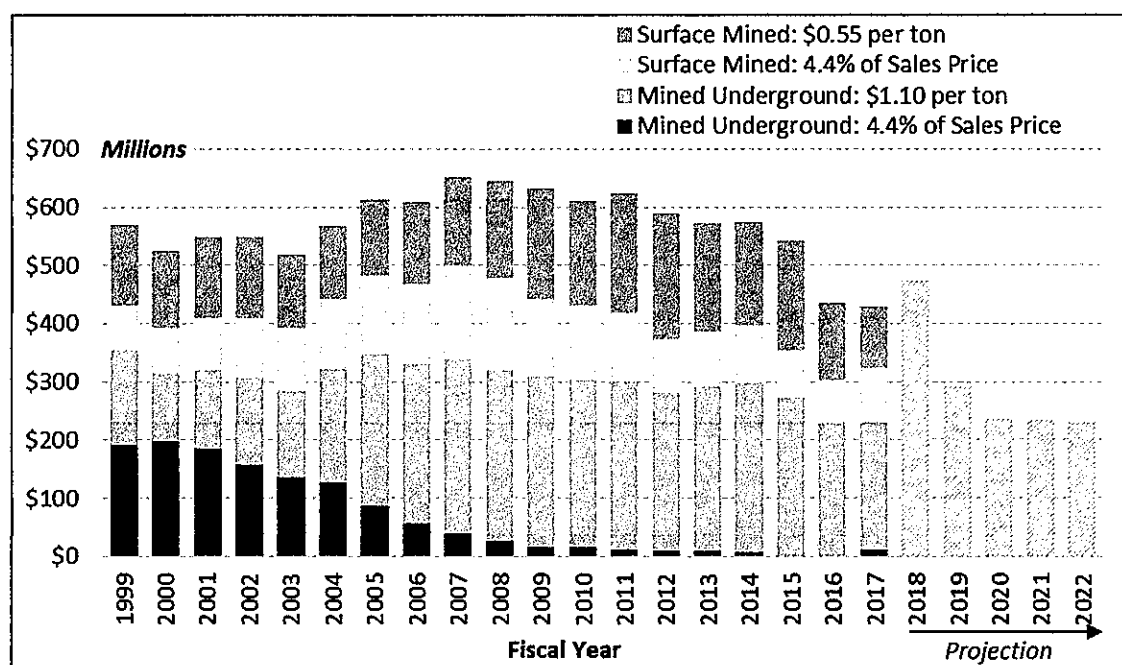
FY2017, \$200 million was collected on surface-mined coal. Just over half of this coal was taxed at the \$0.55 per ton rate, with the rest subject to the 4.4% of sales price maximum tax.

On January 1, 2019, the BLET rates declined to their current levels. The rates that took effect January 1, 2019, would also have taken effect if the Black Lung Disability Trust Fund had repaid, with interest, all amounts borrowed from the General Fund of the Treasury.

The tax is imposed on “coal from mines located in the United States” and does not apply to imported coal. The tax is designed to support the Black Lung Disability Trust Fund for domestic miners. Very little domestically consumed coal is imported.³⁴

The BLET also does not apply to exported coal under the Export Clause of the United States Constitution.³⁵ A credit or refund can be claimed if coal is taxed before it is exported.

Figure 3. Coal Excise Tax Collections
FY1999 - FY2022



Source: IRS SOI Bulletin Historical Table 20, available at <https://www.irs.gov/statistics/soi-tax-stats-historical-table-20>; and Department of the Treasury, Bureau of the Fiscal Service, *Treasury Bulletin*, March 2018, pp. 90-91, <http://www.fiscal.treasury.gov>.

Black lung excise tax collections have generally declined in recent years (see **Figure 3**). In FY2009, more than \$650 million was collected from the BLET. In FY2017, collections were about \$429 million. The decline in BLET collections follows the general decline in U.S. coal

³⁴ In 2017, 731.1 million short tons of coal were consumed domestically. In that same year, coal imports to the United States totaled 7.8 million short tons. Data on coal consumption and imports is available from the Energy Information Administration (EIA), at: <https://www.eia.gov/coal/data.php>.

³⁵ See IRS Notice 2000-28 and CRS Report R42780, *Export Clause: Limitation on Congress's Taxing Power*, by Erika K. Lunder.

production.³⁶ As the price of coal rose in the 2000s, coal mined underground tended to pay the tax at a fixed rate of \$1.10 per ton, as opposed to paying 4.4% of the sales price.

In the years beyond 2018, coal excise tax receipts are expected to fall sharply, reflecting the decrease in the coal excise tax rate (see **Figure 3**).

Legislative History

The excise tax on coal was established to help ensure the coal industry shared in the social costs imposed by black lung disease. Over time, the rate of the tax has been increased, in an effort to provide sufficient revenue to meet this objective.

Establishing an Excise Tax on Coal

The Black Lung Benefits Revenue Act of 1977 (P.L. 95-227) first imposed the Section 4121 excise tax on coal. When enacted, the tax was \$0.50 per ton for coal from underground mines, and \$0.25 per ton for coal from surface mines. The tax was limited to 2% of the sales price. The tax was effective for sales after March 31, 1978.

Before P.L. 95-227 was enacted there was considerable debate surrounding how black lung benefits programs should be financed.³⁷ Various mechanisms to shift the costs of the black lung benefits program to the coal industry and its customers were considered. These debates ultimately led to the establishment of the Black Lung Disability Trust Fund and the related excise tax on coal.

There was also debate about how to structure the proposed tax. Some suggested a graduated tax, with higher rates imposed on coal with a higher British thermal unit (Btu) content, as such coal was believed to be more likely to cause black lung disease.³⁸ There were concerns, however, that such a tax could be difficult to administer. Other proposals suggested that coal be subject to a uniform rate, with coal mined from underground deposits subject to a higher rate than other coal (including lignite). A concern with this approach was that coal prices vary substantially per ton for different types of coal (lignite is less expensive than anthracite), meaning that the tax as a percent of the sales price could differ substantially across different types of coal. One answer to this concern is to impose an *ad valorem* tax, or a tax based on the sales price. Another approach that was considered was to impose a “premium rate” at a level that would fully finance the Black Lung Disability Trust Fund, giving authority to the Department of Labor to adjust the fee as necessary. The tax as enacted was the lesser of the per-unit price or the *ad valorem* rate of 2%.

Increasing the Rate of Tax

In the early 1980s, it was observed that coal excise tax revenues were not sufficient to meet the trust fund’s obligations. The Black Lung Benefits Revenue Act of 1981 (P.L. 97-119) doubled the excise tax rates to \$1.00 per ton for coal from underground mines, and \$0.50 per ton for coal from surface mines, not to exceed 4% of the sales price. The higher rates were effective January 1, 1982. The doubled rates were temporary, and scheduled to revert to the previous rates on January

³⁶ See Energy Information Administration, *Average U.S. Coal Mining Productivity Increases as Production Falls*, March 7, 2018, available at <https://www.eia.gov/todayinenergy/detail.php?id=35232#>.

³⁷ See U.S. Congress, Senate Committee on Finance, *Tax Aspects of Black Lung Legislation*, committee print, prepared by Joint Committee on Taxation and Committee on Finance, 95th Cong., June 21, 1977, JCS-35-77, available at <https://www.jct.gov/publications.html?func=startdown&id=4028>.

³⁸ *Ibid.*

1, 1996. Further, the rates could be reduced earlier if the trust fund repaid all advances and interest from the general fund of the Treasury. A stated goal of this legislation was to eliminate the Black Lung Disability Trust Fund's debt.³⁹

The Consolidated Omnibus Budget Reconciliation Act of 1985 (P.L. 99-272) again increased the BLET rates to \$1.10 for underground-mined coal, and \$0.55 for surface-mined coal, not to exceed 4.4% of the sales price. The Omnibus Budget Reconciliation Act of 1987 (P.L. 100-203) extended these rates through 2013.

Increased excise tax rates on coal were again extended in 2008. Current-law rates were extended through 2018 as part of the Emergency Economic Stabilization Act of 2008 (EESA; P.L. 110-343). When extending the increased rates, Congress reiterated the original intent of establishing trust fund financing for black lung benefits, observing that it is "to reduce reliance on the Treasury and to recover costs from the mining industry."⁴⁰ It was also observed that the program's expenses had continued to exceed revenues over time, and that the debt to the Treasury was not likely to be paid off by 2013. For these reasons, "the Congress believe[d] that it [was] appropriate to continue the tax on coal at the increased rates beyond the expiration date."⁴¹

Borrowing and Debt

When receipts of the trust fund are less than expenditures, advances are appropriated from the general fund of the Treasury to the trust fund. These advances are repayable, and interest charged on these advances is also payable to the general fund.⁴² The Consolidated Omnibus Budget Reconciliation Act of 1985 (P.L. 99-272) provided a five-year forgiveness of interest on debt owed to the Treasury's general fund. As a result, the principal amount of trust fund debt outstanding was relatively unchanged throughout the late 1980s.⁴³ The moratorium on interest payments ended September 30, 1990.

Throughout the 1990s and into the 2000s, the cumulative end-of-year debt of the trust fund grew, and the trust fund continued to receive repayable advances from the general fund to cover expenses. The trust fund was subject to financial restructuring when the current excise tax rate was extended until January 1, 2019, in EESA.

The Black Lung Disability Trust Fund debt was restructured in FY2009. Essentially, the partial forgiveness and restructuring allowed the trust fund to refinance outstanding repayable advances and unpaid interest on those advances. As a result of the partial forgiveness and refinancing, the cumulative debt was reduced from \$10.4 billion at the end of FY2008 to \$6.2 billion by the end of FY2009. At the time of the restructuring it was expected that the trust fund's debt would be fully eliminated by FY2040.⁴⁴ The trust fund's cumulative debt has trended downward since the restructuring (see **Figure 4**). However, coal excise tax revenue has been less than anticipated in

³⁹ Background information in CRS Report 82-59 EW, *Summary and Legislative History of P.L. 97-119, "Black Lung Benefits Revenue Act of 1981,"* by Barbara McClure (out of print; available from the author).

⁴⁰ U.S. Congress, Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 110th Congress*, 110th Cong., March 2009, JCS-1-09, p. 302.

⁴¹ Ibid.

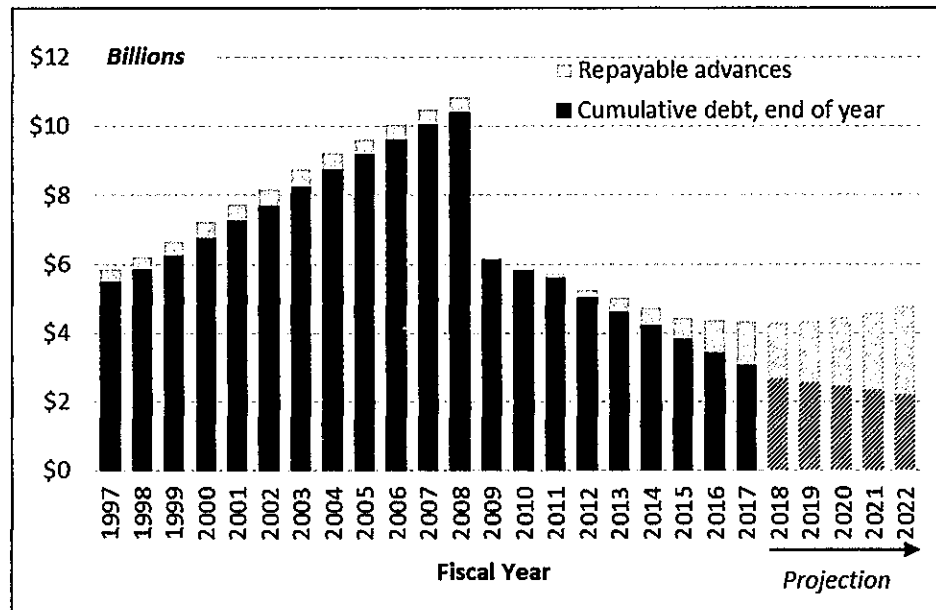
⁴² Repayable advances must be repaid once there is money available in the Black Lung Disability Trust Fund for such purpose.

⁴³ U.S. Government Accountability Office, *Black Lung Benefits Program: Options for Improving Trust Fund Finances*, GAO-18-351, May 2018, available at <https://www.gao.gov/products/GAO-18-351>.

⁴⁴ Ibid.

recent years. As a result, current projections suggest that the trust fund debt will rise over time when considering annual borrowing as well as legacy debt. The trust fund's debt is therefore not on a path to be eliminated. By FY2050, the Government Accountability Office (GAO) projects the trust fund's debt will be \$15.4 billion without any changes in current policy.⁴⁵

Figure 4. Black Lung Disability Trust Fund Debt
FY1997 – FY2022



Source: CRS graphic using data from Department of the Treasury, Bureau of the Fiscal Service, *Treasury Bulletin*, Annual Releases and TreasuryDirect Black Lung Disability Trust Fund Reports, Annual Releases.

Notes: Data for FY1997 through FY2017 is the cumulative end-of-year debt plus repayable advances received in the fiscal year. Data for FY2018 through FY2022 are projections. The repayable advance received in FY2009 of \$6.5 billion as part of debt restructuring is not included.

Other Revenue Sources

In addition to revenue from the BLET and repayable general fund advances, the trust fund receives revenue from the collection of certain fines, penalties, and interest paid by coal operators and miners and reimbursements from responsible operators.

Fines, Penalties, and Interest

Part C of the BLBA authorizes the following fines and penalties for violations of the act:

- a civil penalty of up to \$1,000 per day for a mine operator's failure to secure benefits through insurance or approved self-insurance;⁴⁶

⁴⁵ Ibid.

⁴⁶ 30 U.S.C. §933(d)(1).

- a fine of up to \$1,000 upon conviction of the misdemeanor offense of knowingly destroying or transferring property of a mine operator with the intent to avoid the payment of benefits for which the mine operator is responsible;⁴⁷
- a fine of up to \$1,000 upon conviction of the misdemeanor offense of making a false or misleading statement or representation for the purposes of obtaining benefits;⁴⁸ and
- a civil penalty of up to \$500 for a mine operator's failure to file a report on miners who are or may be entitled to benefits as required by DOL.⁴⁹

The amount of these penalties and fines, as well as interest assessed, is paid into the trust fund. In FY2017, trust fund receipts from fines, penalties, and interest totaled \$1.2 million. This is a small source of trust fund revenue relative to the coal excise tax, which generated \$428.7 million in trust fund revenues in FY2017.⁵⁰

Collection from Responsible Mine Operators

The trust fund is authorized to begin paying benefits within 30 days if no responsible operator has begun payment. If, after paying benefits, DOL is able to identify a responsible operator, the trust fund may seek to collect from that operator the costs of benefits already paid by the trust fund and interest assessed on this amount.⁵¹ The amount of these collections is paid into the trust fund. In FY2017, \$19.9 million was collected from responsible mine operators. The amount collected from responsible mine operators has fluctuated over time, but has averaged about 1% of total receipts since 1995.⁵²

Financial Condition and Outlook

Various factors have contributed to the ongoing situation of trust fund expenditures exceeding trust fund revenues. Throughout the 1980s, black lung benefit payments and administrative expenditures exceeded trust fund revenue. As a result, the trust fund accumulated debt. As discussed above, over time, various efforts have been made to improve the fiscal condition of the trust fund. However, as of the end of FY2017, the trust fund remains in debt. The trust fund's cumulative debt at the end of FY2017 was \$3.1 billion.⁵³ The trust fund also borrowed \$1.3 billion from the general fund that same year.

Projections suggest that borrowing from the general fund will increase over the next few years, even as cumulative (or legacy) debt is paid down. Under the current excise tax rates, benefit payments and administrative expenses will be approximately equal to trust fund revenues in FY2020 through FY2022 (see **Figure 5**). However, revenues are not projected to be sufficient to repay debt, and expenses are projected to rise over time when debt and interest expenses are

⁴⁷ 30 U.S.C. §933(d)(2). This offense can also result in imprisonment for up to one year.

⁴⁸ 38 U.S.C. § 941. This offense can also result in imprisonment for up to one year.

⁴⁹ 38 U.S.C. § 942.

⁵⁰ Department of the Treasury, Bureau of the Fiscal Service, *Treasury Bulletin*, March 2018, pp. 90-91, <http://www.fiscal.treasury.gov>.

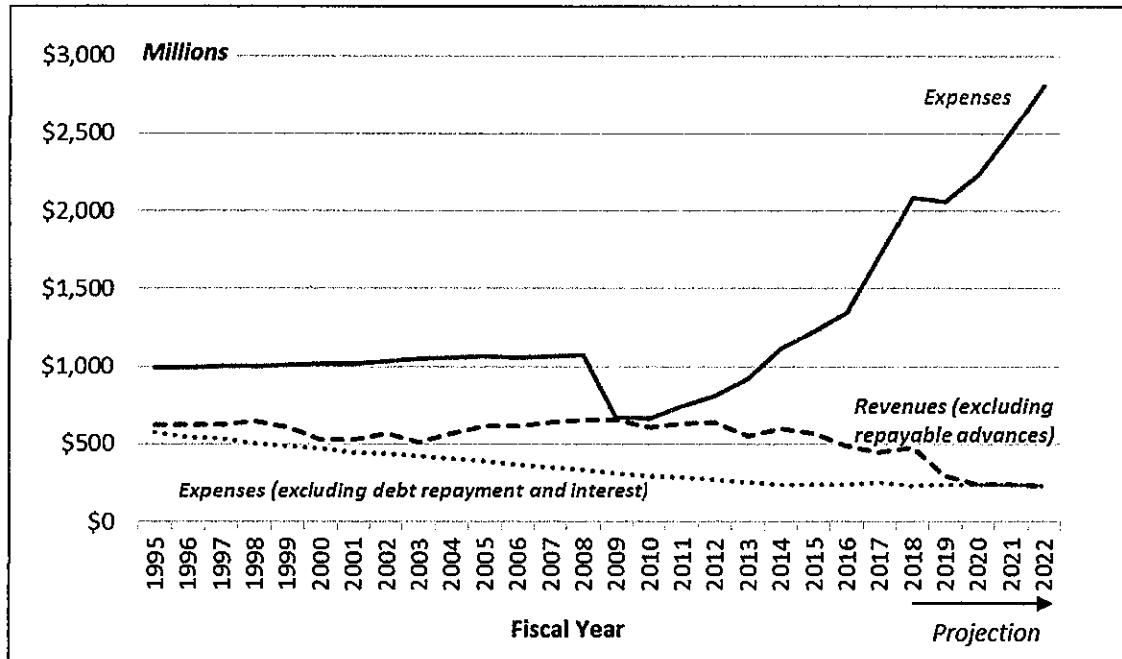
⁵¹ 38 U.S.C. § 934(b).

⁵² Department of the Treasury, Bureau of the Fiscal Service, *Treasury Bulletin*, annual editions.

⁵³ Department of the Treasury, Bureau of the Fiscal Service, *Treasury Bulletin*, March 2018, pp. 90-91, <http://www.fiscal.treasury.gov>.

included. Specifically, by FY2022, it is projected that the trust fund will borrow \$2.6 billion in repayable advances from the general fund.⁵⁴

Figure 5. Black Lung Disability Trust Fund: Revenues and Expenses
FY1995 – FY2022



Source: CRS graphic using data from the Department of the Treasury, Bureau of the Fiscal Service, *Treasury Bulletin*, Annual Releases.

Notes: Revenues includes excise tax receipts; receipts reported on the Form 990BL files by 501(c)(21) black lung trusts; fines, penalties, and interest; collection from responsible mine operators; and recovery of prior year funds. Expenses include Treasury administrative expenses; program expenses and salaries and expenses at DOL; and, as indicated, interest and debt repayment expenditures. The \$6.5 billion in expenses associated with debt restructuring in FY2009 is not included.

Policy Issues and Options

There are various policy options that Congress might consider to improve the fiscal condition of the Black Lung Disability Trust Fund. Broadly, increasing taxes on the coal industry (or maintaining 2018 rates) would pass the costs associated with paying black lung benefits onto the coal industry. Alternatively, forgiving trust fund interest or debt or financing black lung benefits out of general fund revenues would pass the costs of federal black lung benefits onto taxpayers in general. Another option would be to reduce federal black lung benefits.

Revenue Options

Additional revenue would likely need to be provided to the trust fund if the trust fund is to pay for past black lung benefits and maintain current benefit levels. Additional revenue may be needed

⁵⁴ Ibid.

even if past debt is forgiven (or assumed by the general fund), as anticipated trust fund revenues are not likely to be sufficient to cover anticipated trust fund expenditures.

Change the Coal Excise Tax

As discussed above, in the past, Congress and the President have opted to increase the excise tax on coal to address shortfalls in the Black Lung Disability Trust Fund. These increased rates have been temporary, and scheduled to revert back to the reduced rate if the trust fund's debt is eliminated. Congress has chosen to extend the increased rates beyond their scheduled expiration when the trust fund is in debt. One option would be to extend 2018 rates. The GAO projects that if 2018 coal excise tax rates are extended, the trust fund will have a debt of \$4.5 billion in 2050 (see "GAO Options for Improving Trust Fund Finances" below).⁵⁵ GAO projections suggest that increasing 2018 tax rates by 25% would eliminate the trust fund's debt, leaving the trust fund with a surplus of \$0.6 billion in 2050.

Modify Coal Industry Tax Benefits

An alternative way to raise revenue from the coal industry is to scale back or eliminate various tax expenditures, or tax preferences, from which the coal industry benefits. For example, coal producers benefit from being able to expense exploration and development costs and are able to recover costs using percentage depletion (depletion based on revenue from the sale of the mineral asset) instead of cost depletion (depletion based on the amount of the mineral asset exhausted and the amount invested in the asset). The Obama Administration regularly proposed repealing these tax incentives as part of the Administration's annual budget.⁵⁶

It could be difficult to assign the revenues raised via the repeal of tax benefits to the trust fund. With an excise tax, it is straightforward to identify the revenue generated by the tax and earmark the revenue for a trust fund. It is not as straightforward to determine the amount of revenue that is raised through the repeal of an income tax expenditure, or direct the additional revenue raised because a certain preference is no longer in the code to a trust fund. Repeal of coal-industry tax benefits could, however, be used to offset the cost of a one-time transfer from the general fund to the trust fund.

Provide Additional General Fund Revenue

Revenue from various sources, including the general fund, could be used to supplement trust fund revenue generated from current sources. General fund revenues are not earmarked for a specific purpose, and there is generally no direct link between the source of general fund revenue and the

⁵⁵ The data presented in this report are from GAO's moderate case simulations. Moderate case simulations assume that future coal production is consistent with the Energy Information Administration's reference case. Changes in economic conditions or the policy environment could lead to more or less coal production, or contribute to changes in coal prices. These changes could cause higher or lower coal excise tax revenue collections. GAO provides alternative simulations exploring how Black Lung Disability Trust Fund balances would change under a range of alternative assumptions. Under GAO's range of scenarios, trust fund debt could be between \$1.8 billion and \$12.5 billion if 2018 coal excise tax rates were extended. The GAO assumes that coal production does not change in response to changes in the excise tax. More on the assumptions used in GAO's moderate case simulations, and outcomes under various scenario simulations, can be found in Appendix 1 and Appendix 2 of U.S. Government Accountability Office, *Black Lung Benefits Program: Options for Improving Trust Fund Finances*, GAO-18-351, May 2018, p. 22, available at <https://www.gao.gov/products/GAO-18-351>.

⁵⁶ Department of the Treasury, "General Explanations of the Administration's Fiscal Year 2017 Revenue Proposals," February, 2016, available at https://www.treasury.gov/resource-center/tax-policy/Pages/general_explanation.aspx.

government good or service provided. Black lung benefits were paid out of general revenue before the trust fund was established in 1977.

Trust funds are generally established when there is a link between the government benefits or services being provided and the revenue source funding those benefits or services.⁵⁷ The Black Lung Disability Trust Fund was established because Congress believed that the costs of the part C black lung program should be borne by the coal industry.⁵⁸ Financing black lung benefits with general fund revenue would weaken the link between the industry and black lung benefits, while reducing the burden on the industry associated with paying for black lung benefits.

Forgive Trust Fund Interest or Debt

In the past the Black Lung Disability Trust Fund's fiscal outlook has been improved through interest and debt forgiveness. As discussed above, in the late 1990s, there was a five-year forgiveness of interest on debt owed to the Treasury's general fund. More recently, debt was forgiven as part of the 2008 restructuring of the trust fund's debt.

The GAO projects that if all current debt were forgiven, the trust fund would accumulate \$2.3 billion in new debt by 2050. If all interest were forgiven, the trust fund debt is projected to be \$5.8 billion by 2050. Forgiving the trust fund's interest or debt obligations would shift the burden of paying for black lung disability benefits from the coal industry to general taxpayers. However, a one-time appropriation to forgive interest or debt is a transparent option for satisfying the trust fund's obligations to the general fund.⁵⁹

GAO Options for Improving Trust Fund Finances

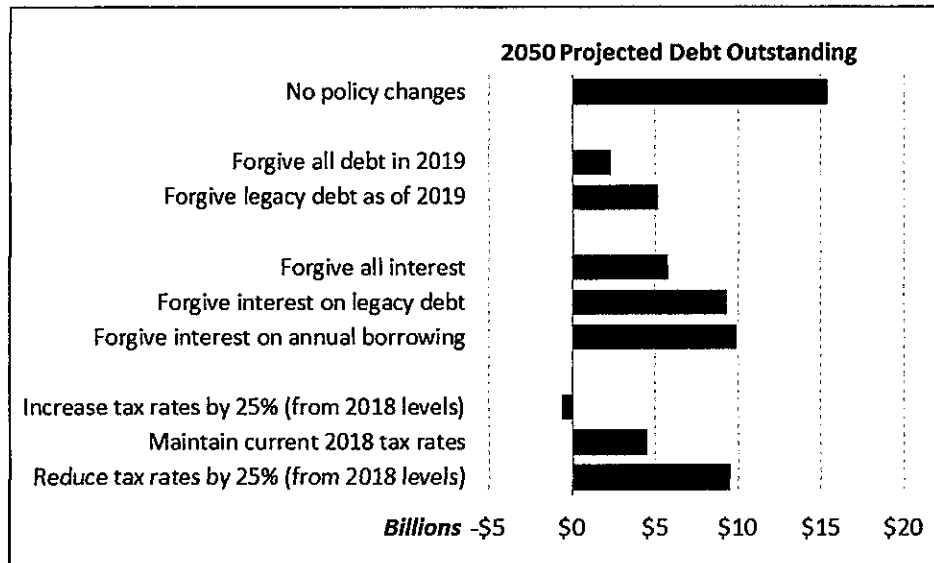
In a May 2018 report the Government Accountability Office (GAO) projected the debt of the Black Lung Disability Trust Fund under a variety of policy scenarios. These scenarios are summarized in **Figure 6**. Broadly, benefit payments and administrative costs are expected to increase in the near term (into the mid-2020s), but eventually decline over time. Trust fund revenue, however, is expected to fall sharply after excise tax rates are reduced in 2019. Even if all current debt is forgiven, projections suggest trust fund revenues will not be sufficient to cover trust fund obligations, under current policy. Similarly, forgiving interest on the debt is not expected to eliminate trust fund debt over the longer term (by 2050). Extending the 2018 excise tax rates on coal is also not sufficient to achieve zero trust fund debt by 2050. However, projections suggest that increasing excise tax rates by 25% above 2018 levels would lead to a trust fund surplus of \$0.6 billion by 2050.

Policies combining debt forgiveness and additional revenues may also be considered. For example, GAO projects that the trust fund would have zero debt in 2050 if 2018 coal excise tax rates were extended and \$2.4 billion in debt were forgiven.

⁵⁷ For background information on federal trust funds, see CRS Report R41328, *Federal Trust Funds and the Budget*, by Mindy R. Levit.

⁵⁸ U.S. Congress, Senate Committee on Finance, *Black Lung Benefits Revenue Act of 1977*, S. 1538, 95th Cong., 1st sess., July 12, 1977, Report No. 95-336.

⁵⁹ U.S. Government Accountability Office, *Black Lung Benefits Program: Options for Improving Trust Fund Finances*, GAO-18-351, May 2018, p.22, available at <https://www.gao.gov/products/GAO-18-351>.

Figure 6. Projected Debt Outstanding with Various Policy Options, 2050

Source: CRS graphic using data from the U.S. Government Accountability Office, *Black Lung Benefits Program: Options for Improving Trust Fund Finances*, GAO-18-351, May 2018, p. 22, available at <https://www.gao.gov/products/GAO-18-351>.

Notes: The 2050 results presented here are from GAO's moderate case simulations. Moderate case simulations assume that future coal production is consistent with the Energy Information Administration's reference case. Changes in economic conditions or the policy environment could lead to more or less coal production, or contribute to changes in coal prices. These changes could cause higher or lower coal excise tax revenue collections. GAO's moderate case simulations also assume that the number of black lung beneficiaries evolves following historical trends. Sensitivity analysis performed by GAO provides a range of estimates under various assumptions for revenues and beneficiaries associated with the policy options presented in **Figure 6**. This extended analysis is available in Appendix I and Appendix II of U.S. Government Accountability Office, *Black Lung Benefits Program: Options for Improving Trust Fund Finances*, GAO-18-351, May 2018, available at <https://www.gao.gov/products/GAO-18-351>.

Expenditure Options

The primary expenditures of the trust fund are for the payment of Part C benefits to miners in cases in which there is no responsible operator. In order to reduce expenditures and improve the long-term financial health of the trust fund, Congress could consider several options to reduce the generosity and scope of benefits or increase the ability of the federal government to ensure that coal operators, even those who are in the bankruptcy process, pay benefits for their miners.

Reduce Benefit Amounts

A reduction in the amount of Part C benefits would result in lower Part C expenditures from both responsible coal operators and the trust fund. However, as compared to other workers' compensation benefits, Part C benefits are relatively low. The basic Part C benefit rate for a single miner is equal to 37.5% of the base rate of pay for federal employees at the GS-2, Step 1 level. For 2019 this benefit is just over \$660 per month, or under \$8,000 per year. In the majority of state workers' compensation programs, the basic benefit rate is set at two-thirds of the worker's

pre-disability wage, subject to statutory minimums and maximums.⁶⁰ The other workers' compensation programs administered by DOL, the LHWCA, and the Federal Employees' Compensation Act (FECA) use two-thirds of a worker's pre-disability wage as the basis for their benefits.⁶¹ A federal worker with a spouse or dependent in the FECA program is entitled to 75% of his or her pre-disability wage. The minimum benefit for total disability or death in the FECA program, 75% of GS-2, Step 1, is twice the amount of the Part C benefit rate. In addition, unlike the other federal workers' compensation programs and many state programs, there is no automatic adjustment to Part C benefits to reflect increases in the cost of living. Part C benefits instead increase only when federal pay rates are increased.

Restrict Benefit Eligibility

The eligibility of miners and survivors to Part C benefits could be restricted to reduce expenditures from responsible operators and the trust fund. In 1981, Congress enacted several eligibility restrictions to miners and survivors as part of the Black Lung Benefits Revenue Act of 1981, to address concerns about the financial insolvency of the trust fund. Specifically, this law removed the following three eligibility presumptions for new claims going forward:

- A rebuttable presumption that the death of a miner who worked in mining for at least 10 years and who died of any respirable disease, was due to pneumoconiosis (listed as presumption 2 in **Table 1**).
- A rebuttable presumption that a miner employed in mining for at least 15 years, and who has a chest x-ray that is interpreted as negative with respect to certain statutory standards but who has other evidence of a totally disabling respiratory or pulmonary impairment, is totally disabled due to pneumoconiosis, or died due to pneumoconiosis. This presumption may only be rebutted by the Secretary of Labor establishing that the miner does not or did not have pneumoconiosis or that the miner's respiratory or pulmonary impairment did not arise out of connection to mine employment (presumption 4 in **Table 1**).
- A presumption that a miner who died on or before March 1, 1978, and who was employed in mining for at least 25 years before June 30, 1971, died due to pneumoconiosis, unless it is established that at the time of the miner's death, he or she was not at least partially disabled due to pneumoconiosis (presumption 5 in **Table 1**).

In addition to removing three of the five existing eligibility presumptions, the 1981 law also removed the right of the survivors of a miner who is determined to be eligible for Part C benefits at the time of his or her death to receive survivors' benefits without filing a new claim, thus permitting the payment of survivors' benefits in the case of a current beneficiary, even if the beneficiary's death is not proven to be linked to pneumoconiosis.

Two of the restrictions put in place by the 1981 legislation were later removed by the ACA. The ACA reinstated the fourth eligibility presumption and expanded rights for survivors' benefits, thus expanding eligibility for both miners and certain survivors.

⁶⁰ For additional information on state workers' compensation programs, see CRS Report R44580, *Workers' Compensation: Overview and Issues*, by Scott D. Szymendera.

⁶¹ For additional information on the FECA program, see CRS Report R42107, *The Federal Employees' Compensation Act (FECA): Workers' Compensation for Federal Employees*, by Scott D. Szymendera.

Increase the Ability of the Federal Government to Recover Benefit Costs from Responsible Operators

Under Part C of the BLBA, the federal government may recover the costs of benefits, and interest accrued on those benefits, paid by the trust fund from identified responsible operators. In addition, Part C allows the federal government to place a lien on the property and rights to property of an operator that refuses to pay the benefits and interest it owes to the trust fund. In the case of a bankruptcy or insolvency proceeding, this lien is to be treated in the same manner as a lien for taxes owed to the federal government.

However, in a 2016 letter to the Comptroller General requesting a GAO review of the trust fund, Representatives Bobby Scott, Ranking Member of the House Committee on Education and the Workforce, and Sander Levin, Ranking Member of the House Committee on Ways and Means, claimed that the number of current and potential bankruptcies among coal operators is placing stress on the trust fund.⁶² Representatives Scott and Levin cited the example of Patriot Coal which, according to their letter, transferred \$62 million in Part C liabilities to the trust fund when it became insolvent. In addition, this letter claims that insolvent coal operators may be able to avoid trust fund liens by continuing to make benefit payments until after the court in their bankruptcy cases has approved the sale of their assets to another company. Because the original company was never in default of its payments, no lien was filed, and these assets were able to be purchased by another company without any lien or future liability to the trust fund.

Congress may examine the issue of the impact of coal operator bankruptcies and the interaction of bankruptcy law and the BLBA's lien provisions, to strengthen both the federal government's ability to ensure that responsible operators are paying for benefits and reduce the benefit expenditures of the trust fund.

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Disclaimer

⁶² Letter from Rep. Bobby Scott, ranking member, House Committee on Education and the Workforce, and Rep. Sander Levin, ranking member, House Committee on Ways and Means, to Gene Dodaro, comptroller general, September 23, 2016, <https://democrats-edworkforce.house.gov/download/gao-request-letter-re-solvency-of-black-lung-benefits-trust-fund>.

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